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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

RICHARD K. EHRLICH, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust,

Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIDES, PAUL A. JACOBS,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeal, State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Culver City's imposition of a $280,000.00 exaction as a condition of approval of a 30 unit town home project, imposed not to mitigate any impacts of the development project's burden on the community but to mitigate the loss to the community of a terminated and demolished privately owned business on privately owned real property, constitutes a taking under the Fifth Amendment?

Whether a monetary exaction is subject to the standard of scrutiny set forth in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)?

Whether a "nexus" exists between the $280,000.00 exaction and the value of petitioner's demolished improvements and the unrealized profits on the 30 unit town home project?

Whether Culver City's imposition of said $280,000.00 exaction on only one property owner in the entire City violates petitioner's equal protection rights?

Whether mandatory compliance with Culver City's Arts in Public Places Program constitutes a Taking under the Fifth Amendment?

Whether mandatory compliance with Culver City's Arts in Public Places Program violates petitioner's equal protection rights?

QUESTIONS PRESENTED – Continued

Whether mandatory compliance with Culver City's Arts in Public Places Program constitutes a violation of petitioner's First Amendment Rights?

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In The

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RICHARD K. EHRLICH, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust,

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CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIDES, PAUL A. JACOBS,

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Petition For Writ Of Certiorari To The Court Of Appeal, State Of California

PETITION FOR WRIT OF CERTIORARI

Richard K. Ehrlich, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust (hereinafter "Ehrlich") petitions that a writ of certiorari issue to review the published opinion of the California Court of Appeals filed on May 25, 1993 in this civil action.

OPINIONS BELOW

The opinion on rehearing of the California Court of Appeal, Second Appellate District, Division Five is

published at 15 Cal.App.4d 1737 (1993). The text of the opinion is reprinted in the appendix, beginning at App. 1. The Court of Appeal order denying rehearing appears at App. 62.

The original opinion of the California Court of Appeal, Second Appellate District, Division Five filed January 25, 1993, is unreported. The text of the opinion is reprinted in the appendix, beginning at App. 34. The Court of Appeal order granting rehearing appears at App. 64.

The opinion of the Superior Court of California, County of Los Angeles is unreported. The text of the opinion is reprinted in the appendix, beginning at App. 55.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. section 1257. The opinion on rehearing of the California Court of Appeal was filed on May 25, 1993. See App. 1. On June 9, 1993, Ehrlich timely filed a petition for rehearing. The California Court of Appeal filed its order denying the petition on June 23, 1993. See App. 62. On July 2, 1993, Ehrlich filed his Petition for Review with the California Supreme Court. The California Supreme Court's order denying review was filed on August 26, 1993. See App. 61.

The time to petition this Court therefore runs from the first day after August 26, 1993. The last day to file this petition is November 24, 1993 under Supreme Court Rule 30.1 (computation of time) and Supreme Court Rule 13.1 (time for filing petition).

STATUTES INVOLVED

The First Amendment of the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment of the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, Section One of the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The entire text of Culver City Ordinance No. 88-019 is set forth in the appendix beginning at page 80.

The entire text of Culver City Ordinance No. 89-026 is set forth in the appendix beginning at page 75.

STATEMENT OF THE CASE

This action involves the constitutionality of two fees imposed by Culver City as a condition of approval of Ehrlich's application to develop on his property a 30 unit townhouse residential development (the "Project"): (1) A $280,000.00 exaction, in excess of the in-lieu parkland fees which Ehrlich has already paid, for the stated purpose of mitigating the effect of the loss of 11 private tennis courts, a swimming pool and aerobic's room resulting from the development, and (2) A $33,200.00 exaction for the development and placement of art in Culver City.

The pertinent facts are as follows:

A. Property History

In September 1973, Ehrlich as president and sole owner of Downtown Development Corporation ("DDC") executed an agreement to purchase the subject site. Subsequent thereto, in early 1974, Ehrlich prepared a site plan and/or architectural drawings for a *private* tennis club to be erected on the site. Ehrlich submitted the plans to the City for approval. See App. 69. Ehrlich appeared at numerous planning commission and City council meetings to answer questions and concerns of neighboring homeowners who vehemently opposed the use of the site as a recreational facility of any kind. See App. 69.

The specific plan in question was adopted in August 1974 by the City Council in lieu of the usual and customary procedure of site plan review. See App. 69. The purpose of the specific plan as set forth in the City reports

was to assuage surrounding neighbors who were vehemently opposed to the use of the site for any type of recreational facility, and to *"mitigate any adverse effects which might otherwise occur" due to the construction of Ehrlich's recreation facility on the site and to insure that no other C-3 uses, including recreational facilities other than Ehrlich's recreational facility would be constructed and/or operated on the site.* See App. 67. The purchase of the subject property was finalized in January 1975, with title being vested in Ehrlich rather than DDC. The specific plan was amended in February 1975. See App. 69.

The purpose of the specific plan was to mandate the conditions upon which Ehrlich could operate a private tennis club business, if at all, on his property. By its own terms, the specific plan restricts and limits the *development and operation to the exact facility which Ehrlich and countless others had attempted to operate on the site for 12 years.* See App. 68. In addition, the specific plan mandated that the facility be a *private* facility available only to a limited number of members. By incorporating the site plan of Ehrlich's recreational facility into the specific plan, the specific plan, in effect, dictates the exact nature, including size, placement, type and location, of each and every improvement down to the last tree. Changes to Ehrlich's facility were expressly prohibited. Any alteration of the improvements and operational procedures without amendment or removal of the specific plan would be unlawful and result in closing of the facility as well as other civil and/or criminal penalties. See App. 68.

Ehrlich developed and operated the site, himself or through others, as a *private* tennis club continuously through August, 1988. See App. 37, 68. By 1981, a number of different operators of the private tennis club had gone out of business because operation of a facility as dictated

by the specific plan was not an economically viable use of the property. See App. 37, 68.

In 1981, Ehrlich applied to the City for a specific plan amendment in order to allow the development of the site as a commercial office building, consistent with the then existing C-3 zoning on the property. See App. 3, 37. The request was denied. See App. 3, 37.

B. The Project

On or about September 30, 1988, Ehrlich applied to the City for a specific plan amendment to allow development of the site into a 30-unit residential condominium townhouse development (the "Project"). See App. 4, 36. *The Project was consistent with the existing general plan and zoning.* See App. 36.

C. The City's Interest in the Property

Shortly after Ehrlich's submission of the application for the Project in September 1988, the City renewed its interest which had existed for a number of years in acquiring the site for use as a publically owned and operated recreational facility. See App. 38. In connection therewith, the City commissioned a feasibility study. The study concluded that *Ehrlich's existing facility could not operate at a break-even or profitable basis in accordance with the layout mandated by the specific plan. The report stated that a viable recreational facility would require changes to the building structure and layout of the facility which were not permitted by the specific plan, including removal of various tennis courts, destruction of the existing building, and the addition of at least 50 parking spaces requiring acquisition of space from neighboring properties, all at a substantial expense.* See App. 42.

D. The $280,000.00 Exaction

On or about March 23, 1989, Ehrlich with the City's approval obtained a demolition permit and demolished the recreational facilities on the site. Ehrlich donated all of the still useful equipment to the City, including the tennis court lights, nets, and lockers. See App. 37.

On April 10, 1989, the City Council disapproved Ehrlich's application (the "Disapproval"). This action was taken despite the fact that the City staff and Planning Commission had unanimously recommended approval of the Project, that the Project had widespread community support, and that the existing facility had been demolished. See App. 4, 37.

After the Disapproval, Ehrlich had numerous communications with the City, and in particular with City Councilman Gourley, in an attempt to determine the reasons for the Disapproval and to negotiate what conditions might be acceptable in exchange for approval of the Project. See App. 4, 38. *Ehrlich was informed that the Project would not be approved by the City unless Ehrlich agreed to pay for or build new public recreational facilities for the City.* See App. 4, 38.

As a direct result of Ehrlich's negotiations with the City, on July 3, 1989, the City Council agreed to reconsider the Disapproval. The City Council then went into a lengthy, secret session to discuss the Project. See App. 4, 38. After emerging from their secret session, the City Council voted to approve the Project which *included the condition that Ehrlich pay a Thirty Thousand Dollar ($30,000.00) in-lieu park land fee pursuant to Culver City Municipal Code section 33-E.1.* See App. 4, 38. In addition, the Council imposed a requirement of payment of a monetary exaction of Two Hundred Eighty Thousand Dollars ($280,000.00) "for additional recreational facilities as directed by the City Council." See App. 4, 38.

E. The Arts in Public Places Exaction

Culver City Ordinance No. 88-019 (the "Art in Public Places Exaction") requires Ehrlich to pay a Thirty Three Thousand Two Hundred and Twenty Dollar ($33,220.00) exaction to the City for Art in Public Places as a condition of obtaining a Final Certificate of Occupancy for the Project. See App. 4, 38. Ordinance No. 88-019 requires that art erected in the City pursuant to the Art in Public Places program be approved by the City after undergoing a critical City review process. See App. 80-91.

The City conditioned the Project's final approval on the payment of the Art in Public Places monetary exaction despite the fact the City failed to identify the exact use to which the exaction is to be put, determine how there is a reasonable relationship between the exaction's use and the Project on which the exaction is imposed, determine how there is a reasonable relationship between the need for the exaction and the intended use of the Project and determine whether there is a reasonable relationship between the amount of the exaction and the cost of the use attributable to the Project.

F. The Litigation

On November 3, 1989, Ehrlich filed and served the Verified First Amended and Supplemental Petition for Writ of Mandate and Complaint seeking to invalidate both the $280,000.00 exaction and the Art in Public Places Exaction on the basis that, among other things, both exactions were unconstitutional takings under the Fifth and Fourteenth Amendments to the United States Constitution which require that fees and exactions bear a reasonable, proportional relationship to the project being built. See App. 5.

The superior court granted a writ of mandate vacating the $280,000.00 exaction stating that the exaction constitutes an unequal tax discriminatorily applied, and . . . that the exaction constitutes a taking of private property without compensation because the City could not compel Ehrlich to operate a recreational facility on the site, and that, therefore, there was no relationship between the Project and the need for public tennis courts in Culver City. See App. 5-6, 58. "The City's proposed exaction is . . . simply an effort to shift the cost of providing a public benefit to one no more responsible for the need than any other taxpayer . . . The city could have condemned a portion of [petitioner's] property for use as City tennis courts, but the City would then of course have had to pay for the land." See App. 6. In addition, the superior court awarded Ehrlich attorneys fees and costs in the amount of $75,000.00 pursuant to California Code of Civil Procedure section 1036. See App. 6-7, 58.

The Court of Appeal affirmed the superior court decision in its opinion filed January 23, 1993, stating that (1) on the facts Ehrlich was denied an economically viable use of his land without the zone change, (2) there was no legitimate justification in banning the Project as the $280,000.00 was not imposed to mitigate or reduce a harm caused by the Project, (3) there was *no* relationship between a legitimate interest and the $280,000.00 fee and (4) if the City wanted the property for recreational purposes, the City could have taken Ehrlich's property under eminent domain laws and paid Ehrlich fair compensation. See App. 34, 42, 44-46.

On rehearing, the Court of Appeal modified its original opinion and upheld the $280,000.00 exaction despite

the court's acknowledgement that the $280,000.00 bears no relationship to the burdens of the Project:[1]

> "It is important to note that *the mitigation fee was not imposed as a condition relating to the development project's burden on the community for increased community services, such as community recreational facilities* . . . The mitigation fee was imposed to compensate the City for the benefit conferred on the developer by the City's approval of the townhome project and for the burden on the community resulting from the loss of recreational facilities." (Emphasis added.) See App. 14, 15.

Both the superior court and the court of appeals upheld the constitutionality of the Art in Public Places Exaction. See App 26, 28, 32. In its decision, the superior court simply found "the art fee within the scope of the City's police powers." See App. 26, 59.

The Court of Appeal held that the Arts In Public Places Exaction (1) did not constitute a taking of private property stating that Culver City had a right under its general police powers "to require art to be placed on developments as a condition of approval" and that " . . . the mere giving of an option to the developer to pay a fee in lieu of the placement of art on the project does not convert the lawful permit condition into a fee, an exaction . . . or a taking", (2) did not violate Ehrlich's First Amendment Rights because Ehrlich was given the option to purchase his own art[2], and (3) did not violate

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[1] The opinion on rehearing was based, in part, on incorrect factual conclusions as set forth below.

[2] Ehrlich argued that his First Amendment rights were violated because he was required to pay for and/or purchase art which express opinions. The Court of Appeal stated that since

Ehrlich's equal protection rights stating that the requirement of art placement on large scale construction projects is reasonably related to a legitimate public purpose and rationally related to the construction itself. See App. 28-30.

On June 9, 1993, Ehrlich petitioned for rehearing on the ground that the Court of Appeal misunderstood the origin, nature and effect of the specific plan which Culver City had imposed on the property, and consequently, reached incorrect factual conclusions which were central to the Court of Appeal's opinion. See App. 66. The Court of Appeal denied Ehrlich's petition for rehearing on June 23, 1993. See App. 62. Ehrlich's petition for review was denied by the California Supreme Court on August 26, 1993. See App. 61.

REASONS FOR GRANTING REVIEW

The opinion on rehearing in this case is erroneous in almost every respect. In its unprecedented opinion, the California Court of Appeal creates new law which eradicates the restrictions on governmental power which this Court has heretofore outlined and developed in *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987), *Yee v. Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992), *Lucas v. So. Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992) and *Loretto v. Teleprompter*

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the petitioner could place art of his own choosing on the site, the petitioner could not complain that his First Amendment rights had been violated. See App. 29. The Court of Appeal failed to address the issue that Ehrlich has a right not to speak at all and that the City's Art In Public Places program mandates expression in violation of Ehrlich's right to remain silent.

Manhattan CATV Corp., 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). For the first time, a state court has ruled that a permit condition may be imposed *not to mitigate burdens created by the new or proposed use*, but to "mitigate the loss" of a *demolished, prior, private* business which was once operated on the property.

Under the Court of Appeal's reasoning in this case, a governmental agency could always justify the imposition of a "mitigation fee" thereby nullifying *Nollan v. California Coastal Commission, supra; the practical effect is to require a private property owner to operate any private business in perpetuity for the public benefit against his will or construct or pay for reconstruction of the same private business at a new location within the City if that business was at one time operated on the property.* The California Supreme Court's refusal to hear this case means that, in California, this Court's holdings in *Nollan* are eradicated.

This case also provides the Court with an opportunity to resolve the controversy existing among state and federal courts concerning the standard or level of scrutiny to be exercised by courts in examining monetary exactions.

In addition, the Court of Appeal upheld the Art in Public Places Exaction which in effect compels expression in violation of the First Amendment and the Takings Clause of the Fifth Amendment. Art programs, like the Arts in Public Places Exaction in issue in this case, are being instituted by municipalities throughout the country. It is imperative that this Court address the constitutionality of such programs and stop the infringement on personal liberties which these programs impose on individual citizens.

I. THE CALIFORNIA COURT OF APPEAL'S OPINION IN THIS CASE IS INCONSISTENT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT

Justice Scalia expressly acknowledged that the approach of California state courts to issues concerning takings jurisprudence has been inconsistent with nearly every other court. *Nollan v. California Coastal Commission, supra,* 107 S. Ct. at 3149-3150. In recent years, this Court's rulings have reversed and/or called into question a substantial portion of California's inverse condemnation case law. *See e.g. Nollan v. California Coastal Commission, supra, Yee v. Escondido, supra, Lucas v. So. Carolina Coastal Council, supra, Loretto v. Teleprompter Manhattan CATV Corp., supra.*

Despite the rulings of this Court, however, California courts continue to permit governmental agencies to abuse individuals who own private property in California. The case at issue is the most egregious example. In this case, Culver City refused to allow Ehrlich to use his property for *any* purpose other than the specific recreational facility dictated by the specific plan. Culver City held Ehrlich hostage; his release conditioned upon the payment of "extortion" monies, $280,000.00, for the construction of public recreational facilities and $33,200.00 for art in exchange for a permit to build 30 townhomes. Culver City's actions left Ehrlich with technically four options: (1) *rebuild* and operate an economically unfeasible recreational facility for the benefit of the public against his will subject to the limitations of the specific plan, (2) leave the property vacant and unimproved, (3) sell the property to another party who is willing to rebuild and operate at a loss the exact recreational facility mandated by the specific plan[3], or (4) pay for the construction of

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[3] Options (1) and (3) were not a realistic option since the recreational facilities had already been demolished on the site. See App. 37.

recreational facilities elsewhere in the city so that Ehrlich could use his property in an economically feasible manner. Under any option, a taking results.[4]

A. Option 1

This Court has repeatedly stated that the government effects a physical taking where it requires the landowner to submit to the physical occupation of this land. " 'This element of required acquiescence is at the heart of the concept of occupation' (cite omitted)." *Yee v. Escondido, supra,* 118 L. Ed. 2d at 165; *Loretto v. Teleprompter Manhattan CATV Corp., supra,* 73 L. Ed. 2d at 876-883; *Kaiser Aetna v. United States,* 444 U.S. 164, 176, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979); *Lucas v. So. Carolina Coastal Council, supra,* 120 L. Ed. 2d at 812. Where a physical invasion has occurred, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id.* Moreover, this Court, time and again, has recognized that the "right to exclude" others from one's private property is "one of the most essential sticks in the bundle of rights that are commonly characterized as property". *Yee v. Escondido, supra,* 118 L. Ed. 2d at 165; *Kaiser Aetna v. United States, supra,* 444 U.S. at 176. When a private property owner is forced by the government to permit others on his property, against his

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[4] Where, as here, land is reserved for a single use closely resembling a traditional object of eminent domain (the provision of public services and facilities), or the landowner is presented with alternatives that are themselves tantamount to a confiscation, there is the heightened risk that the property is being pressed into some form of servitude under the guise of police powers. This is particularly true where, as here, the challenged restriction affects only a single individual. *Cf. Lucas v. South Carolina Coastal Council, supra,* 112 S. Ct. at 2924 (Stevens, J., dissenting) (citing cases).

will, a taking results. *Ibid.; See also FCC v. Florida Power Corp.*, 480 U.S. 245, 252, 94 L. Ed. 2d 282, 107 S. Ct. 1107 (1987).

Under option one, Ehrlich is forced to rebuild and operate a business and permit the public access to his property against his will. The government cannot force landowners to use property for a particular business. In this case, the City mandates the use to which the property will be put and Ehrlich cannot deviate from that use in *any way*. Ehrlich may not escape the City's mandate by choosing to engage in another business. In a case like this one, where the government forces a landowner to use his property for a particular business, a physical taking occurs. *Yee v. Escondido, supra,* 118 L. Ed. 2d at 165-166. *See also Fresh Pond Shopping Center, Inc. v. Callahan,* 464 U.S. 825, 78 L. Ed. 2d 215, 216, 104 S. Ct. 218 (1983) (Rehnquist, J., dissenting).

B. Options 2 and 3

The Court of Appeal below concedes that Culver City cannot compel Ehrlich to operate the recreational facility as dictated by the specific plan on the site if he no longer desires to do so. "Of course, the City could not require that the developer operate a recreational business on the property". See App. 15. But the Court of Appeal holds that there is no taking because Ehrlich can leave the property vacant, unimproved and economically idle or sell the property (presumably to someone willing to rebuild and operate the property as a recreational facility according to the specific plan). See App. 16. (Options 2 and 3 above.)

This Court's decisions, however, state that neither of these possibilities entitles the City to take Ehrlich's property without compensation. To leave the property in a vacant state denies Ehrlich of all beneficial and productive use of the property and constitutes a taking. *Cf Lucas*

v. So. Carolina Coastal Council, supra, 120 L. Ed. 2d at 813. Likewise, "even though [Ehrlich] may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property. *Loretto v. Teleprompter Manhattan CATV Corp., supra,* 458 U.S. at 435-436, *Fresh Pond Shopping Center, Inc. v. Callahan, supra,* 78 L. Ed. 2d at 216.

C. Option 4

In light of the foregoing, the unconstitutionality of Ehrlich's fourth and final option, specifically, the payment of the $280,000.00 extortion to reconstruct the recreational facilities elsewhere in the City in exchange for the right to beneficial use of Ehrlich's property, is readily apparent. The Court of Appeal examined this option using the two prong test of *Nollan v. California Coastal Commission, supra*: (1) the government agency could deny the request without the denial constituting a taking and (2) the condition imposed substantially furthers the governmental goal furthered by the denial. See App. 11.

Culver City cannot pass the first prong. As already discussed above, Culver City's refusal to remove the specific plan restrictions constitutes a taking. Culver City's action denies Ehrlich the power to control the use of this property, to exclude strangers, and to obtain a beneficial and productive use of his property.

The Court of Appeal, however, incorrectly found that because some recreational facility could return a profit on the property, the first prong of *Nollan* was satisfied. See App. 12-13. The Court of Appeal errs because it ignores the holdings of this Court which recognize that a physical invasion of property constitutes a *taking per se without regard to whether a fair return can be produced on the property*

with the restriction.[5] *Lucas v. So. Carolina Coastal Council, supra,* 120 L. Ed. 2d at 812-813; *Fresh Pond Shopping Center, Inc. v. Callahan, supra,* 78 L. Ed. 2d at 216; *Loretto v. Teleprompter Manhattan CATV Corp., supra.*

Additionally, the Court of Appeal misunderstood the relationship between *Nollan* and *Lucas* in holding that Culver City's actions could not constitute a taking because the specific plan restrictions existed at the time

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[5] Moreover, the Court of Appeal opinion is based upon the erroneous factual conclusion that the specific plan restriction provided Ehrlich an economically beneficial use of his property. Specifically, the Court of Appeal acknowledged the uncontroverted evidence in the record that Ehrlich's facility, with its existing improvements, were inefficient, inadequate, and not well-suited to the current fitness market. See App. 7, 42. The opinion refers to the City feasibility study which concluded that *it was extremely doubtful that the existing facility could operate at a break-even or profitable basis in accordance with the layout mandated by the specific plan. A viable recreational facility would require substantial changes to the building structure and layout of the facility, including removal of various tennis courts, destruction of the existing building, and addition of at least 50 parking spaces requiring acquisition of space from neighboring properties, all at a substantial expense.* See App. 7-8, 12-13.

The Court of Appeal concluded that while Ehrlich's facility with existing improvements could not make a profit, *some kind* of community recreational facility might be operated profitably on the property. See App. 12-13. The Court of Appeal misunderstood that the specific plan restrictions, unilaterally imposed by the City on the property, expressly prohibited any alterations in petitioner's facility or in his operational procedures, ie. hours of operation, sound level, lighting, and opening to the public at large. Consequently, the "circumstances" to which the Court of Appeal refers which might provide for the profitable operation of a recreational facility on the site are not available in this case. See App. 67-69. Consequently, *the specific plan denies Ehrlich all economically beneficial use of his property.*

Ehrlich purchased the property.[6] As reasoned, the Court of Appeal's decision provides a dangerous precedent, which contradicts this Court's decisions, and promotes the over-regulation of property in order to exact extortion monies from property owners to buy their way out of the overweening restrictions.

The Court of Appeal misunderstood that a subsequent purchase is entitled to relief from confiscatory regulation if the prior owner (or anyone else in the chain of succession) would have been so entitled. The Court of Appeals was oblivious to the fact that the Nollans were subsequent purchasers who acquired their property only after the California Coastal Commission had begun its policy of exacting beach access easements a condition for building permit approval. This Court clearly recognized the Nollans as subsequent purchasers and resolved the question in the Nollans' favor:

> "Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Nollan v. California Coastal Commission, supra,* 483 U.S. at 834, n. 2.

In this case, Ehrlich purchased as part of the bundle of rights obtained with title, the right to challenge the

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[6] Once again, the Court of Appeal errs because it bases its opinion upon erroneous factual conclusions. When Ehrlich entered into the purchase agreement to buy the property in 1973, the specific plan limitations were not on the property. Said restriction was placed on the site *by the unilateral act of the City after petitioner was legally obligated to purchase the site.* See App. 63-64. As it turns out, said act by the City left petitioner with no economically beneficial use of the property.

restriction. Nothing in the record suggests that Ehrlich or his predecessor in title agreed to subject the property to a permanent servitude or to waive the right to discontinue the use of the property as a recreational facility should the use subsequently prove unprofitable or undesirable. So long as Ehrlich voluntarily invited the public onto his property to engage in a particular business, the City may well have imposed certain restrictions to protect surrounding areas from the conduct of his business.[7] But the Court is now faced with a different case; where the restriction both facially and as applied compels a property owner over his objection to allow access to his property and to refrain in perpetuity from making beneficial use of his property. *See Yee v. Escondido, supra,* 118 L. Ed. 2d at 166.

Lucas does not affect Ehrlich's right to challenge the exaction. In *Lucas,* this Court held that for an act of governmental regulation depriving a landowner of all use of the property to be upheld, the regulation may only proscribe "noxious uses" which were not part of the bundle of property rights which Ehrlich acquired when he purchased the property; specifically, the regulation must be tied to a common law property or nuisance principle that *prohibited the use prior to the regulation and prior to the date of purchase.*[8] *Lucas v. So. Carolina Coastal Council, supra,* 120 L. Ed. 2d at 820-822.

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[7] When adopted, the purpose of the specific plan was to set forth the conditions under which a recreational facility could be operated on the site. See App. 67.

[8] The property in question was zoned C-3 which permitted the construction of the townhomes without a zoning or general plan change. See App. 3, 37. It follows, therefore, the specific plan restriction did not eliminate a "noxious use".

The Court of Appeal's decision recognized that the second prong of the *Nollan* test concerned the necessary connection or "nexus" between the burden created by a proposed development and the condition exacted to mitigate that burden. See App. 13-14. The court's approach in establishing that nexus, however, departs from the approach of every other court that has applied the nexus principle to the context of developmental exactions. Specifically, the court proffers the novel approach that a condition may be imposed not to mitigate burdens imposed by the *new* use, but to "mitigate the loss" of the previous use of the property. See App. 14-15. The Court of Appeal cites no case authority for this proposition. To the contrary, the court acknowledges that exactions are only justified "in order to lessen the adverse impact of increased population generated by development . . . and [are] directly tied to the increase in [burdens] that this construction will possibly generate." See App. 17-18.

The court concedes that the $280,000.00 exaction was not imposed to mitigate any needs related to or created by the townhomes' burden on the community for increased community services. See App. 14. *The exaction was imposed to compensate the City for the loss of Ehrlich's recreational facilities which at one time existed on the premises.*[9] See App. 15.

The court found that Ehrlich created the need for recreational facilities because he no longer wished to provide them on his property. In doing so, the court baldly rejects the most fundamental attribute of American society; the distinction between private versus public ownership in direct violation of *Ruckelhause v. Monsanto*

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[9] It is important to remember that all the recreational facilities had been demolished by petitioner before imposition of the $280,000.00 exaction as a condition of approval of the Project. See App. 37.

Co., 467 U.S. 986, 1012, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984), and *Webb's Fabulous Pharmacies Inc. v. Beckwith*, 449 U.S. 155, 164, 66 L. Ed. 2d 358, 101 S. Ct. 446 (1980), "[a] sovereign, by *ipse dixit* (sic) may not transform private property into public property without compensation." See App. 15.

The practical effect of the Court of Appeal's insupportable opinion is so far reaching that it must be addressed by this Court. Under the court's ruling, *a property owner could be forced to continue operation of any business, which was once open to the public, even though that business has ceased and been destroyed* because those services were provided to the public in the past; parochial schools will be forced to reconstruct "educational opportunities" and grocery stores to reconstruct "culinary opportunities". The effect of this case is to add an additional risk of opening a private business; the risk that the owner will be unable to terminate the business should it turn out to be unprofitable.

II. THE COURT SHOULD CLARIFY THE STANDARD OF SCRUTINY TO BE IMPLEMENTED IN EXAMINING MONETARY EXACTIONS

The Court of Appeal's errors may arise in part from the confused state of both state and federal lower court decisions, some of which flatly contradict United States Supreme Court precedents. The Court of Appeal, citing *Blue Jean Equities West v. City and County of San Francisco*, 3 Cal.App.4th 164, 169-171 (1992) and *Commercial Builders v. Sacramento*, 941 F.2d 872, 875 (9th Cir 1991), states that "monetary exactions compelled as condition of approval must be only rationally related to the governmental purpose." See App. 14. The appellate court in this case relies

on *Commercial Builders* to unjustifiably limit the application of *Nollan's* "heightened scrutiny" requirement to permit conditions involving physical invasions.

In fact, *Nollan* has no application to physical invasion cases which are per se takings regardless of the connection between the government's purpose and the permit condition. *Cf. Lucas v. So. Carolina Coastal Council, supra,* 120 L. Ed. 2d at 812-813, designating two categories of takings which require compensation *without consideration of the governmental purpose involved;* (1) physical invasions, no matter how minute the intrusion and (2) regulatory takings which deprive all economically beneficial or productive use of land.

Indeed, this Court in *Yee* cites *Nollan* as an example of a regulatory takings case, distinguishing it from physical takings:

> "[Evidence of the distributional effects of a regulation] might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance. See Nollan v. California Coastal Comm'n, supra, at 834-835, 97 L Ed 2d 677, 107 S. Ct. 3141. But it has nothing to do with whether the ordinance causes a *physical* taking." *Yee, supra,* 118 L. Ed. 2d at 167 (emphasis in original).

Thus the notion found in this case, *Blue Jean Equities,* and *Commercial Builders* that *Nollan* is merely a physical invasion case is erroneous and contradicts this Court's decisions in *Nollan, Agins v. City of Tiburon,* 47 U.S. 255, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1990), *Yee* and *Lucas* which enunciate that the "substantially advancing test" applies to regulatory takings, including monetary exactions. Indeed, the notion also conflicts with the opinions of numerous state and federal courts who have considered

the meaning of *Nollan*.[10] This Court should grant review in order to resolve the conflict which exists among state and federal court decisions concerning the application of *Nollan* and the standard or level of scrutiny that should be used in examining the "nexus" between legitimate government objectives and permit conditions.

III. THE CONDITION CANNOT BE JUSTIFIED BY AN INTEREST WHICH DID NOT MOTIVATE THE REGULATION

Conditions of approval of a project which do not serve the same legitimate governmental purpose as the building restriction constitute a taking. *Nollan v. California Coastal Commission, supra,* 483 U.S. at 837:

> " . . . [T]he lack of nexus between the condition and the *original purpose of the building restriction* converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation."

The imposition of a $280,000.00 fee bears *no relationship* to the original purpose of the restriction. The $280,000.00 exaction was imposed to operate and or construct *community* recreational services. The purpose of the specific plan restriction was to ensure that *community* facilities which the City proposes to operate were *not* constructed on the site.[11] Nor was the exaction imposed to mitigate adverse effects of construction. See App. 67.

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[10] *See Seawall Associates v. City of New York,* 542 N.E.2d 1059, 1068 (N.Y. 1989); *In the Matter of the "Plan for Orderly Withdrawal from New Jersey" of Twin City Fire Insurance Company,* 609 A.2d 1248, 1259 (1992), *Surfside Colony, Ltd. v. California Coastal Commission,* 226 Cal.App.3d 1260 (1991).

[11] The specific plan limited operation of the recreation facilities on the site to a *private, members only* facility.

In effect, the Court of Appeal opinion permits any governmental agency to concoct, ex post facto, any governmental purpose which could justify the imposition of any condition. This is especially true where, as in this case, the court proffers the unprecedented approach that a condition may be imposed not to mitigate burdens imposed on the *new* or *proposed* use, but to "mitigate the loss" of the previous use of the property.

In effect, the Court of Appeal opinion recommends and condones all city's to over-regulate property, ie. spot zone, and then exact extortion monies from developers to buy their way out of the restrictions. This is exactly the type of maneuvering and manipulation of the police power of which Justice Scalia warns in *Nollan*:

> "One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of land-use goals purportedly sought to be served than would result from more lenient (but non-tradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not *justify* the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice." *Id.* at-837-838, fn. 5.

IV. EHRLICH'S DESIRE TO A PRODUCTIVE AND BENEFICIAL USE OF HIS PROPERTY DOES NOT PROVIDE A JUSTIFICATION FOR A $280,000.00 EXACTION

The Court of Appeal opines that the City and the public at large had a right to $280,000.00 as compensation for the loss of Ehrlich's privately owned improvements

and the benefit Ehrlich received in allowing the improvement's demolition. *Neither the City nor the public had any rights in said improvements.* See specifically *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979), wherein the United States Supreme Court stated that the United States Government held no rights in private improvements, erected at substantial expense of the owner. In this case, the City had no more rights in the club improvements than it would in a private swimming pool or tennis court existing in the back yard of a private home.

Yet, the City and the Court of Appeal below found that $280,000.00 figure was justified by the value of Ehrlich's improvements and the amount of potential profits generated by the town home project. The value of Ehrlich's improvements are irrelevant. *The City has no vested rights in said improvements.* It is irrelevant whether the site had 20 tennis courts, two tennis courts or was vacant property.[12] Likewise, the value of the townhomes is irrelevant. Ehrlich is not in business with the City. The police power which forms the exaction's constitutional foundation is not based upon private profit; the City has no right to a percentage of Ehrlich's profits no matter how large or small they may be.

V. THE $280,000.00 EXACTION VIOLATES EHRLICH'S EQUAL PROTECTION RIGHTS

Justice Scalia voiced his concern that permit conditions infringe on equal protection rights. Specifically, he wrote:

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[12] In fact, the value of the improvements on the site at the time the exaction was imposed was zero. With the City's permission, petitioner's facility and the improvements had already been demolished.

> "If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or Equal Protection Clause. One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Nollan, supra,* 483 U.S. at 835-836, fn. 4.

The Court of Appeal concedes that the $280,000.00 exaction in this case "has been imposed on *a single developer* and is a one-time nonrecurring exaction for the approval of a development." (Emphasis added.) See App. 18. Ehrlich has been singled out to and required to surrender something more and different to the public than anyone else in the City. The $280,000.00 exaction was the City's way to provide a public benefit at the expense of one individual.

The Court of Appeal argues that fee bears a reasonable relationship to the losses resulting from the Project. See App. 20. For all the reasons already discussed hereinabove, the evidence fails to establish that the amount of the fee bears any relationship to the 30 townhome project.

VI. THE COURT'S APPROVAL OF THE ARTS IN PUBLIC PLACES EXACTION VIOLATES THE FIFTH AMENDMENT

Under *Nollan,* dedication and in-lieu fee requirements like the Art in Public Places exaction will be valid only so long as they are *necessitated* by the development of the Project and the need could be a basis for the complete prohibition of the Project. *Nollan* puts an end to

the previous government practice of funding pet programs by attaching a fee as a condition of issuing a permit or some other governmental benefit. *Nollan* mandates a case specific examination of the relationship between the permit condition and the governmental objective and the relationship between the amount charged and the burden imposed by the Project.

To pass *Nollan*, the Art in Public Places Exaction must alleviate some adverse impact emanating from the proposed development which related to art and aesthetics.[13] Ehrlich's Project, however, has no adverse impact on art or aesthetics within the City. Ehrlich was not proposing to remove any public art. Ehrlich was not blocking the view of any public art. *Nor does the Project eliminate the possibility that art will be created or displayed on the property.* To the contrary, the townhomes, which provide residential housing, will provide *increased* opportunities for art. Artwork will be displayed on the walls of the homes. Residents may set up studios within the homes and actually create art. Clearly, *the Project provides far more artistic possibilities than those generated by a sports facility or by property left idle.*

In contrast, the City receives nothing in the way of art by a development ban. The City would not have gained public art; it would not have preserved a prettier building. It is clear, therefore, that the City is not attempting to mitigate adverse impacts of projects with the fee. Rather, *the City is simply trying to underwrite a social program which would be nice to have, but which the public does not want badly enough to finance through higher taxes.* This Court's warning in *Nollan* fits: "The commission may well

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[13] In fact, the City found that Ehrlich's Project had a positive aesthetic impact as compared to the recreational facility mandated by the specific Plan. See App. 77.

be right that [more public beach] is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization." *Nollan, supra,* 483 U.S. at 841. Public art may be a good idea, but that does not establish that Ehrlich can be compelled to contribute to its realization.

VII. THE ARTS IN PUBLIC PLACES EXACTION VIOLATES THE EQUAL PROTECTION CLAUSE

For all the same reasons as set forth in the discussion concerning the unconstitutionality of the $280,000.00 exaction, the Arts in Public Places Exaction violates Ehrlich's equal protection rights. The Court of Appeals analogy to on site improvements is misplaced. See App. 26-27. Landscaping, lighting, parking, gutters, etc. are site specific improvements *necessarily required by construction of the new development for health and safety.* There is no such *need* in the case of artwork. Art is a luxury. If the City wants it, all should bear the cost equally.

VIII. THE COURT OF APPEAL OPINION UPHOLDS THE ART IN PUBLIC PLACES EXACTION IN VIOLATION OF EHRLICH'S FREE SPEECH RIGHTS

Government and related entities may not compel citizens to express a particular viewpoint or advocate a particular expression of opinion. *Abood v. Detroit Board of Education,* 431 U.S. 209, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977); *Keller v. State Bar of California,* 496 U.S. 1, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990).

These principles prohibit the compulsion of any individual to affirm a belief in God, to associate with a particular political party, or to contribute to the support of an ideological cause he may oppose as a condition of

holding public employment. *Abood v. Detroit Board of Education, supra,* 431 U.S. at 235. Nor can a bar association use mandatory dues to support objectionable political activities. (*See Keller v. State Bar of California, supra;* compulsory dues to finance political and ideological activities of the State Bar violates the rights of free speech guaranteed by the First Amendment of disagreeing members.)

The Arts in Public Places Exaction violates Ehrlich's First Amendment rights. Ehrlich can comply with the ordinance in one of three ways: (1) Payment of a fee to the City which is used for the purchase and display of art within the City, (2) Donate an *approved* piece of art to the City or (3) Erect an *approved* piece of art on Ehrlich's property. See App. 27-28.

Apparently, the Court of Appeal agreed with Ehrlich that the mandatory payment of monies to the City for art which may express an opinion which Ehrlich may find objectionable violates the First Amendment. See App. 29. The court below ignored this violation, however, on the rationale that Ehrlich could have commissioned his own artwork subject to the City's *approval* in lieu of paying the fee. See App. 29.

The court ignores the fact that the First Amendment protects the right not to speak just as much as it protects the right to speak. Cf. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 634, 645, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943) (mandatory flag salute case):

> "The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except in so far as essential operations of government may require it for the preservation of an orderly society, – as in the case of compulsion to give evidence in court." *Id.* at 645 (Murchpy, J., concurring).

Since the Arts in Public Places Exaction requires Ehrlich to commission art of a third party, Ehrlich is compelled to

pay monies to propagate someone else's ideas which are on public display in violation of Ehrlich's freedom of speech and association under the First Amendment.

CONCLUSION

This case comes down to one point. Culver City wants recreational facilities, Culver City wants art work, and Culver City wants someone else to pay for them. Although Ehrlich is not responsible for the City's desire for recreational facilities or art work, he is simply the most convenient patsy because he owns property which once housed a defunct health club and because he now wishes to make productive use of his property.

California courts, as well as others, misunderstand the doctrines of this Court as set forth in *Nollan, Lucas, Yee,* and *Loretto.* Government agencies and municipalities are taking advantage of this misunderstanding. The Court should take this opportunity to redress these misunderstandings and clarify the limits of constitutional government action. This Court's takings jurisprudence should not be transmuted into a rule of the convenient patsy.

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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November 24, 1993

APPENDIX

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RICHARD K. EHRLICH, Plaintiff and Appellant, v. THE CITY OF CULVER CITY et al., Defendants and Appellants.	B055523 (Super. Ct. No. C730079) (Filed May 25, 1993)

APPEAL from a judgment of the Superior Court of Los Angeles County. John Zebrowski, Judge. Affirmed in part, reversed in part with directions.

Lisa S. Ehrlich and Edward J. Horowitz for Plaintiff and Appellant.

Pacific Legal Foundation, Ronald A. Zumbrun, Edward J. Connor, Jr. and Timothy A. Bittle as Amici Curiae on behalf of Plaintiff and Appellant.

Norman Y. Herring, City Attorney, Evelyn Keller and Carol Schwab, Deputy City Attorneys; Kane, Ballmer & Berkman, Joseph W. Pannone and Michael D. Montoya for Defendants and Appellants.

This case involves the imposition of two fees imposed on a developer by a municipality as conditions of approval of a development project: (1) a $280,000 fee to mitigate the impact of a land-use change (the mitigation fee); and (2) a $33,220 fee in lieu of a requirement that art be placed on the development project (the in lieu art fee). The City of Culver City, the City Council of Culver City and members of the City Council of Culver City (collectively the City) appeal from the judgment of the trial court issuing a writ of mandate invalidating the mitigation fee imposed by the City against Richard K. Ehrlich (the developer)[1] in exchange for approval of a 30-unit townhome development located in the City (the development project). The City contends the mitigation fee was a constitutionally permissible monetary exaction reasonably related to a legitimate public purpose. The developer contends the mitigation fee was an unconstitutional taking of his property, which did not substantially advance a legitimate public purpose directly related to the approval of the development project. The City also contends the trial court erred by releasing its lien against the developer's property and in awarding the developer attorney's fees pursuant to Code of Civil Procedure section 1036.

The developer cross-appeals from the judgment of the trial court denying his petition for writ of mandate to invalidate the imposition of a monetary exaction in the form of the in lieu art fee in exchange for approval of the development project. He also appeals from the denial of his request for attorney's fees pursuant to Government

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[1] Richard K. Ehrlich is the trustee of certain family trusts which are the actual owners of the subject property.

Code section 800 and Code of Civil Procedure section 1021.5.

FACTS

The property in question consists of 2.4 acres located at 4901 Overland Avenue in Culver City (the property). Prior to October 28, 1974, the property was owned by the developer's predecessor in interest and was split-zoned R-1 (single-family dwelling) and C-2 (retail commercial). On October 28, 1974, at the request of the developer's predecessor in interest, the zoning was changed to C-3 (commercial) and a specific plan was adopted providing for the development of a sports facility, a private tennis club and recreational facility. The developer's predecessor in interest did not develop the property, but leased it to the City for use as a little league baseball field.

In 1975, the developer purchased the vacant property. The developer subsequently improved the property and operated it as a private tennis club and recreational facility. The recreational facility included a heated swimming pool, a jacuzzi, a sauna, five tennis courts, three paddle tennis courts, a jogging track, an aerobics area, and a building with lockers, a kitchen, and other accessory uses. The estimated value of the improvements was $800,000. The private tennis club was not a financial success. In 1981, the developer applied to the City for changes to the property's land-use restrictions to permit the construction of an office building. This application was denied by the City on the ground that the existing private tennis club facility provided needed recreational facilities for the City.

On August 30, 1988, the developer closed the private tennis club and, subsequently, donated to the City much of the movable equipment associated with the tennis club.

In September 1988, the developer applied to the City for changes to the property's land-use restrictions to permit construction of 30 deluxe townhomes valued at $10 million. The City denied the application in April 1989 on the ground that the land-use restrictions provided needed recreational facilities for the City.

On July 7, 1989, the developer filed a petition for writ of mandate and complaint for damages. In the meantime, the developer sought to obtain the City's reconsideration of its denial. Apparently, the developer offered to build four tennis courts in exchange for approval of the development project. In August and September 1989, the City reconsidered its former denial and approved the development project, subject to certain conditions including the payment of the $280,000 mitigation fee, the $30,000 in lieu parkland fee, and the $33,220 in lieu art fee. On November 3, 1989, the developer amended the complaint. In January 1990, the City and the developer agreed that, in exchange for the City's approval of the development project, the developer would pay the $280,000 mitigation fee for the loss of recreational facilities to the City occasioned by the changes in the land-use restrictions. The developer, however, retained the right to judicially challenge the validity of the mitigation fee. The developer also agreed that the City would obtain a lien upon the property as security for payment of the mitigation fee.

PROCEDURAL BACKGROUND

In his petition and complaint, the developer sought: to set aside the $280,000 mitigation fee and the $33,220 in lieu art fee; related declaratory relief; just compensation for the taking of his property; and damages for violations of his civil rights. The petition for writ of mandate was bifurcated from the balance of the complaint. On August 14, 1990, the hearing on the petition for writ of mandate was heard by the trial court. On September 6, 1990, the trial court issued its ruling on the petition. The trial court invalidated the $280,000 mitigation fee: "The stated purpose of [the $280,000 mitigation fee] is to 'replace' tennis courts no longer available in the community due to the closing of [the developer's] private tennis club. [¶] [The developer's] club (although most likely a public accommodation for civil rights purposes) was at all times private property; the [C]ity never owned any interest in it nor was any part of it ever dedicated to public use. It is conceded that [the developer] had no obligation to maintain his facility available for public use, but rather that [the developer] retained the right to exclude the public from his premises. It is true that the public accommodation laws would essentially require [the developer] to make the facilities available to the public generally so long as the premises were operated as a business, but there was no requirement that [the developer] operate the premises as a business. Instead, [the developer] was at all times free to go out of business, which he in fact did. [¶] There is . . . no reasonable relation . . . between [the developer's] project and the need for public tennis courts in [the City]. [¶] In this case, [the developer's] actions cannot legally be said to deprive the City of tennis courts,

because neither did [the developer] have an affirmative duty to provide tennis courts to the City or its residents nor would tennis courts necessarily be available to the City but for [the developer's] project. ([The developer] was at all times free to discontinue business as a tennis club, and in fact did so). The City's [$280,000 mitigation fee] is . . . simply an effort to shift the cost of providing a public benefit to one no more responsible for the need than any other taxpayer. [¶] The City could have condemned a portion of [the developer's] property for use as City tennis courts, but the City would then of course have had to pay for the land. Here, instead of taking land for which it would have had to pay, the City proposes to take not land but money. This is equally impermissible." The trial court found the $280,000 mitigation fee constituted an unequal tax discriminatorily applied and a taking of private property without compensation.

The trial court refused to invalidate the in lieu art fee and refused to award attorney's fees.

On December 12, 1990, the trial court modified its ruling to provide that the lien securing payment of the $280,000 mitigation fee be removed by the City no later than January 7, 1991. On January 4, 1991, the City filed its notice of appeal and a fully executed release of lien with the trial court. On January 15, 1991, the trial court again modified the judgment by declaring the lien null and void and ordering the clerk of the court to record the release of lien. On January 17, 1991, the City filed a notice of appeal from this modification of the judgment. On February 8, 1991, the trial court awarded the developer sanctions against the City pursuant to Code of Civil Procedure section 128.5 in the amount of $5,804.75 for the

City's failure to timely remove the lien. On February 25, 1991, the trial court awarded the developer costs including attorney's fees pursuant to Code of Civil Procedure section 1036 in the amount of $69,195.25. The City filed a notice of appeal from the award of costs and attorney's fees.

DISCUSSION

I. The $280.000 Mitigation Fee

On September 30, 1988, the developer applied to the City for a general plan amendment, zone change, adoption of a new specific plan, tentative tract map, and design and physical development plan amendment.

After receiving the developer's applications, the City initially considered acquiring the developer's property by eminent domain. In connection with this possibility, a feasibility study was prepared for the City concerning the economic feasibility of the recreational facilities on the property. The report concluded that the inconsistency of management and problems of upkeep were contributing factors to the financial problems of the facility. The report also concluded that the design concept and use of space at the facility were inefficient, inadequate, and not well-suited to the current fitness market. The report further concluded: "Based on the demographics and the existing clubs in the area, we believe there is a strong market for a full scale, community family health and fitness center. The clubs that are attempting to serve this market tend to specialize or provide only a partial offering of services and activities in demand. We saw no concerted effort to tap emerging senior or children's fitness markets or overt

attempt to provide services to the rapidly expanding business community. All things considered, there appears to be considerable unmet demand in the Culver City area." Finally, the report concluded that the facility could be run in an economically feasible manner if certain improvements were made to the facility.

The City initially denied the developer's applications on April 10, 1989, on the ground that the existing land-use restrictions on the property were needed by the community. Correspondence from the City's Human Services Director had indicated the property had a history of community recreational use and a land-use change would negatively impact the availability, whether public or private, of community recreational facilities in the City.

The developer sought to have the City reconsider its denial and offered, as a compromise, to build four unlit tennis courts elsewhere in the City to replace the recreational facilities which might be lost on the property. The City determined that replacement costs for the recreational facilities which had been on the property were as follows: pool – $250,000 to $280,000; paddle tennis courts – $135,000 to $150,000; and tennis courts – $275,000 to $300,000. On August 28, 1989, the City adopted ordinances approving an amendment to the general plan, amending the design and physical development plan, approving the tentative tract map, and requiring the payment of a $30,000 in lieu parkland fee. The minutes of a meeting of the City Council held on August 28, 1989, state: "In addition to all other approvals recommended by the Planning Commission, a fee of $280,000.00 should be required. This fee will be used to pay for replacement of community recreational facilities which are currently

provided for by the land use permitted on the subject site, which will be removed pursuant to this approval. [¶] The need for community recreational facilities has been evidenced by previous staff reports, consultant reports, and public testimony indicating the use and feasibility of such facilities at the subject site. Staff reports indicated the existing permitted recreation facilities, consisting of tennis courts, paddle tennis courts, swimming pool, running track, aerobics area, jacuzzi, sauna, and related sports club amenities, had an estimated value of at least $800,000.00. Based on the developer's estimated value of the proposed residential project of $10,000,000.00 and in lieu of imposing the developer's proposal to build four tennis courts as a condition of approval of this project, a fee of $280,000.00 for partial replacement of the lost recreational facilities is a reasonable imposition in order to protect the public health, safety, and welfare."

On September 11, 1989, the City adopted an ordinance rezoning the property from C-3 (commercial) to R-3a (low density multiple family dwelling) and approved the new specific plan, subject to an additional condition. The ordinance provided, "Prior to issuance of any temporary or final Certificate of Occupancy for the proposed project, the developer shall pay to the City the amount of $280,000.00 to be used for additional recreational facilities as directed by the City Council."

In January 1990, the developer and the City entered into an Agreement For Lien For Developer's Fees. This agreement provided in pertinent part:

> "WHEREAS, as a condition of approval for development of the Project, and to mitigate for

the loss of needed community recreational facilities existing on the Site, construction of the Project was conditioned on Developer's payment to City of fees to be used for additional recreational facilities. . . . [¶] NOW, THEREFORE, the parties . . . do hereby agree as follows: 1. Developer agrees, as a condition of issuance of the grading and building permits for the Project, to pay to City the sum of Two Hundred Eighty Thousand Dollars ($280,000.00), in accordance with the provisions of this agreement. [¶] 2. Developer shall be required to make the entire payment of $280,000.00 in cash to the City Treasurer on or prior to the date any Certificate of Occupancy for any townhouse condominium unit is issued. [¶] 3. Developer agrees to make the above-stated payment under protest. Nothing in this agreement shall in any way waive or restrict Developer's rights to pursue any protest Developer has made under Government Code § 66008 and by the above-mentioned lawsuit and to have a court of competent jurisdiction determine what amount, if any, should be refunded to developer. [¶] 4. City shall use said $280,000.00 only for additional recreational facilities, as directed by the City Council."

A. Unconstitutional Taking

The City contends the trial court erred in finding that the $280,000 mitigation fee constitutes the unconstitutional taking of private property without just compensation. The developer responds that the $280,000 mitigation fee constitutes an illegal permit condition resulting in an unconstitutional taking of his property. Specifically, developer argues the validity of the mitigation fee must

be determined under the two-prong test set forth in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825: (1) the government agency could have denied the request without the denial constituting a taking; and (2) the condition imposed substantially furthers the government goal furthered by a denial. The developer argues that the mitigation fee does not meet either prong of this test. He asserts the denial of the specific plan amendment by the City would have constituted a taking and there is no nexus between the mitigation fee and the development project. We will consider initially the first prong of the *Nollan* test.

"[L]and-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land' [citation]." (*Nollan v. California Coastal Comm'n, supra,* 483 U.S. at p. 834.) Land-use regulations effect a taking and are, therefore, compensable, if the regulations compel the property owner to suffer even a minute physical invasion of his or her property or the regulations deny the owner of property "all economically beneficial or productive use of land." (*Lucas v. South Carolina Coastal Council* (June 29, 1992) ___ U.S. ___ [112 S.Ct. 2886, 2893].) A land-use regulation which merely deprives the owner of the property's most profitable use does not effect a taking. (*Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 125-138.) A regulation which deprives land of all economically beneficial use does not effect a compensable taking if "the proscribed use interests were not part of [the property owner's] title to begin with." (*Lucas v. South Carolina Coastal Council, supra,* [112 S.Ct. at p. 2899].) In determining whether land-use regulations

effect a compensable taking, the owner's reasonable investment-backed expectations are to be taken into account. (*Penn Central Transp. Co. v. New York City, supra,* at p. 124.)

In this case, the developer contends the land-use regulations requiring the property to be used as community recreational facilities deprived him of all economically beneficial use of the property. He bases this contention on the evidence that he had been unable to operate the existing facility at a profit over a number of years. He argues that since the land-use restrictions deprived him of all economically beneficial use, maintaining the restrictions would have constituted a compensable taking, and, therefore, the City had no choice but to give him permission to build his luxury townhome project. These arguments are seriously flawed.

First, the trial court did not find that the land-use regulations to which the property was subject deprived the developer of all economically beneficial use of the property. (See, e.g., *Lucas v. South Carolina Coastal Council, supra,* ___ U.S. ___ [112 S.Ct. at p. 2890].)

Second, the mere fact that a particular property owner has not been able to make a profit from a particular recreational facility fails to establish that no community recreational facility could be operated profitably on the property. (See, e.g., *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. at pp. 120-122.) Property is generally deprived of all economically beneficial use where construction is banned entirely, such as when the property is required to remain as open space. Evidence in the record indicates a community recreational facility

could be operated profitably on the property under certain circumstances.

Finally, the land-use regulations in question restricted the property's use at the time the developer purchased the property. (See, e.g., *Gilbert v. State of California* (1990) 218 Cal.App.3d 234, 256.) The land-use regulations had been placed on the property at the request of the developer's predecessor in interest. The developer purchased the property with knowledge of the restrictions and with the intent to develop the property as a private tennis club. Under these facts, the land-use regulations could not constitute a taking even if the property could not be operated profitably as a community recreational facility. The land-use restrictions on the property coincided with the developer's reasonable investment-backed expectations. He was not constitutionally entitled to develop the property to its most profitable use.

Accordingly, we conclude the first prong of the *Nollan* test has been met. The City was not required to approve the development project and a denial of the request would not have effected a compensable taking. We next look to the second prong of the *Nollan* test.

Conditions on approval of a project which serve the same legitimate governmental purpose as a refusal to approve the project do not constitute a taking if the refusal would not have constituted a taking. (*Nollan v. California Coastal Comm'n, supra,* 483 U.S. at p. 836.) Where the condition on approval constitutes a physical taking of private property, the condition must substantially advance the governmental purpose and is subject to heightened scrutiny by the courts. (*Blue Jeans Equities*

West v. City and County of San Francisco (1992) 3 Cal.App.4th 164, 169-171.) Monetary exactions compelled as a condition of approval must be only rationally related to the governmental purpose. (*Id.* at p. 168 [San Francisco's Transit Impact Development Fee]; *Commercial Builders v. Sacramento* (9th Cir. 1991) 941 F.2d 872, 875 [low-income housing fee].)

The imposition of the $280,000 fee was imposed for the express purpose of mitigating the effect of the loss of land restricted to community recreational use which would result from approval of the developer's project. The imposition of the mitigation fee was directly related to the original denial of the developer's applications for his project and was not a subterfuge or pretext to increase the general funds of the City. (Cf. *Morse v. San Luis Obispo County* (1967) 247 Cal.App.2d 600, 603.) Moreover, the use of the funds by the City was expressly limited to the provision of recreational facilities for the community. The governmental purpose supporting a denial of the project was the loss of community recreational facilities which would be occasioned by the luxury townhome development. The $280,000 mitigation fee was rationally related to this governmental purpose. Even were we to find the "substantially advance/heightened scrutiny" test of *Nollan* to be applicable, we would conclude that the mitigation fee met this test. There was a substantial nexus between the land-use restriction and the condition of approval.

It is important to note that the mitigation fee was not imposed as a condition relating to the development project's burden on the community for increased community services, such as community recreational facilities. (See,

e.g., *Rohn v. City of Visalia* (1989) 214 Cal.App.3d 1463.) The mitigation fee was imposed to compensate the City for the benefit conferred on the developer by the City's approval of the townhome project and for the burden on the community resulting from the loss of recreational facilities.

The developer argues that the mitigation fee did not substantially advance the governmental purpose of providing *private* community recreational facilities, because the fee was to be used to provide *public* community recreational facilities. We do not find the distinction between public and private recreational facilities to be compelling. The property was restricted to community recreational facilities. Approval of the project deprived the community of the opportunity for these recreational facilities. The $280,000 mitigation fee would in some measure allow the City to replace the lost recreational facilities. Whether the facilities were provided to the public in the form of a privately-owned facility or one which was owned by the public is not significant on the issue of whether the governmental purpose is the same. The City had a legitimate need for community recreational facilities whether public or private, and both the land-use restriction and the mitigation fee served that same need.

The developer also argues that the City was not deprived of community recreational facilities by its approval of the development project, because he had already abandoned the recreational facility and was no longer in business. This argument does not withstand close scrutiny. Of course, the City could not require that the developer operate a recreational business on the property. (*Terminal Plaza Corp. v. City and County of San*

Francisco (1986) 177 Cal.App.3d 892, 908-911 [restrictions on condominium conversions].) Developer was entitled to go out of business and leave his land vacant or sell it to someone else. The City could, however, require that the developer use his property, if at all, for a recreational purpose. This restriction is no different than refusing to permit apartments to be converted to condominiums. (*Ibid.*)

Finally, the developer argues the amount of the fee is arbitrary and excessive. The City, however, presented evidence that the value of the recreational facilities, which existed on the property prior to their removal, was $800,000. The City also presented evidence that the town-home project was valued at $10 million. In addition, the fee was related to the cost of constructing four tennis courts at another location ($275,000 to $300,000). The trial court did not find that the amount was excessive. Under these circumstances, we cannot say the fee was excessive or arbitrary.

B. Special Tax

The City contends the trial court erred in finding that the $280,000 mitigation fee constitutes a prohibited special tax. The developer responds that the $280,000 mitigation fee constituted a special tax "in the sense that the exaction constitutes an unequal tax discriminatorily applied." Pursuant to Proposition 13, a city may impose a special tax only by a two-thirds vote of the electorate. (Cal. Const., art. XIII A, § 4.) A special tax (Gov. Code, § 50075) does not include a fee which "does not exceed

the reasonable cost of providing the service or the regulatory activity for which the fee is charged and which is not levied for general revenue purposes." (Gov. Code, § 50076.)

"Much has been written on the subject whether development fees are special taxes. [Citations.] Under one line of reasoning, development fees are not taxes at all since they do not bear the indicia characteristic of taxes: they are not compulsory but rather apply only to those who voluntarily choose to develop, they are not imposed upon all nonexempt properties alike, and they are not levied for the purpose of producing general revenue. [Citations.] These cases hold that development fees are in the nature of special assessments rather than taxes. Consequently, the limitations described by Article XIII A, section 4 [of the California Constitution], do not apply. [Citations.] Indeed, it stands to reason that voters could be expected to endorse the imposition of 'taxes' which only the developers would be obliged to pay. Thus, where the fees at issue are directed only at a partial segment of the population, the voting process will not necessarily validate them as 'special taxes.' [Citation.] On the other hand there are cases holding that a development fee may be an invalid special tax absent a two-thirds vote if it exceeds the reasonable cost of providing the service for which it is charged. [Citations.]" (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 240.)

"Typically, a development fee is an exaction imposed as a precondition for the privilege of developing land, commonly enacted in order to lessen the adverse impact of increased population generated by the development. [Citation.] On the other hand, special taxes as defined in

Proposition 13 (Cal. Const., art. XIII A, § 4) are 'taxes . . . levied for a specific purpose rather than . . . a levy placed in the general fund to be utilized for general governmental purposes.' [Citation.] [¶] 'One characteristic of a special tax is that it levies a fee to replace revenue for services which were affected by the reduction caused by article XIII A. [Citations.] In contrast, the [development fee] is not intended to replace revenues lost as a result of article XIII A. It is triggered by the voluntary decision of the developer to construct [the project] and is directly tied to the increase in [burdens] that this construction will possibly generate.' " (*Carlsbad Mun. Water Dist. v. OLC Corp.* (1992) 2 Cal.App.4th 479, 485-486.) "The determination of whether a particular fee is a development fee or a special tax is a question of law." (*Id.* at p. 485.)

We doubt the $280,000 mitigation fee at issue here can properly be characterized as a special tax. As noted in *Shapell Industries, Inc. v. Governing Board, supra,* 1 Cal.App.4th at p. 240, even a typical development fee does not easily come within the confines of the definition of a special tax. The typical development fee is not compulsory; it is applicable only to those who voluntarily choose to develop their properties; it is not applicable to all property; and it is not designed to generate general revenue. The $280,000 mitigation fee is even less like a special tax than the typical development fee. A typical development fee is applicable to all who choose to develop properties. The $280,000 mitigation fee in this case has been imposed on a single developer and is a one-time nonrecurring exaction for the approval of a development. The $280,000 mitigation fee is not a special tax.

Even were we to conclude that the mitigation fee was subject to the requirements of Government Code section 50076, we would, nevertheless, conclude the mitigation fee did not constitute a special tax. As noted previously, the amount of the fee is reasonably related to the actual costs of mitigating the loss of community recreational facilities, i.e., $280,000 represents the actual cost of replacing just four tennis courts. Accordingly, the amount of the fee does not exceed the reasonable cost of providing the service for which the fee was imposed. Once again, it is important to focus on the fact that the $280,000 fee was not imposed on the developer to mitigate the increase in requests for recreational facilities resulting from his 30 townhomes. It was imposed to compensate the community for the loss of recreational facilities in the community occasioned by the change in the land-use restrictions. (Compare *Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208.)

The mitigation fee also was not levied for general revenue purposes. (*Terminal Plaza Corp. v. City and County of San Francisco, supra,* 177 Cal.App.3d at pp. 906-907.) The developer argues the record establishes that the City had a preexisting need for funds for public recreational facilities, and the mitigation fee was imposed to alleviate this problem. This is not an accurate representation of the record. The mitigation fee was imposed for the sole purpose of replacing recreational facilities lost to the community as a result of the land-use changes requested by the developer; expenditure of the fee was expressly limited for this purpose. (See, e.g., *California Bldg. Industry Assn. v. Governing Bd.* (1988) 206 Cal.App.3d 212, 236.) The fee was not intended to replace revenue lost as a result of

Proposition 13; it was triggered by the developer's voluntary decision to develop his recreational facility into a luxury townhome project; it is directly tied to the replacement of lost recreational facilities. (See, e.g., *Carlsbad Mun. Water Dist. v. QLC Corp., supra,* 2 Cal.App.4th at p. 491.) The fact that no specific plans for expenditure of the funds were adopted does not require a different result. (*Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 331.)

C. Equal Protection

The developer argues the $280,000 mitigation fee violates his equal protection rights. Our conclusion that the mitigation fee bears a reasonable relationship to the loss of recreational facilities occasioned by the land-use changes disposes of this claim. (*Shapell Industries, Inc. v. Governing Board, supra,* 1 Cal.App.4th at pp. 247-248; cf. *Garrick Development Co. v. Hayward Unified School Dist., supra,* 3 Cal.App.4th at p. 338.)

D. Government Code Section 66000 et seq.

Although the trial court did not reach this issue, the developer contends the mitigation fee is also invalid as a result of the City's failure to comply with Government Code section 66001. We are not persuaded by this argument. Effective January 1, 1989, the Legislature established a procedural scheme for the imposition of fees for development projects by local agencies. (Gov. Code, § 66000 et seq.) Under the statutory scheme, a development project is a "project undertaken for the purpose of

development [and] includes a project involving the issuance of a permit for construction. . . . " (*Id.* at § 66000, subd. (a).) A fee is a monetary exaction which is charged by a local agency in connection with the approval of a development project for the purpose of defraying the cost of public facilities related to the development project. (*Id.* at § 66000, subd. (b).) A charter city is a local agency. (*Id.* at § 66000, subd. (c).)

When a local agency imposes fees on development projects pursuant to an initial, quasi-legislative adoption of development fees, the local agency must: (1) identify the purpose of the fee; (2) identify the use to which the fee is to be put; (3) determine how there is a reasonable relationship between the fee's use and the type of development project; and (4) determine how there is a reasonable relationship between the need for the public facility and the type of development project. (Gov. Code, § 66001, subd. (a).) When a local agency imposes a development fee on a case-by-case adjudicatory basis, the local agency must determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility attributable to the development project. *Id.* at § 66001, subd. (b).)[2] (*Garrick Development Co. v. Hayward Unified School Dist., supra,* 3 Cal.App.4th at pp. 334-337.)

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[2] Government Code section 66001 reads as follows:

"(a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall do all of the following:

"(1) Identify the purpose of the fee.

"(2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a

"These requirements appear to expand slightly on the reasonable relationship test previously used by courts

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capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged.

"(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

"(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

"(b) In any action imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

"(c) Upon receipt of a fee subject to this section, the local agency shall deposit, invest, account for, and expend the fees pursuant to Section 66006.

"(d) The local agency shall make findings once each fiscal year with respect to any portion of the fee remaining unexpended or uncommitted in its account five or more years after deposit of the fee to identify the purpose to which the fee is to be put and to demonstrate a reasonable relationship between the fee and the purpose for which it was charged. The findings required by this subdivision need only be made for moneys in the possession of the local agency and need not be made with respect to letters of credit, bonds, or other instruments taken to secure payment of the fee at a future date.

"(e) Except as provided in subdivision (f), the local agency shall refund to the then current record owner or owners of lots or units of the development project or projects on a prorated basis the unexpended or uncommitted portion of the fee, and any interest accrued thereon, for which need cannot be demonstrated pursuant to subdivision (d). A local agency may refund the unexpended or uncommitted revenues by direct payment,

to test quasi-legislative action like the [City's] in this case. Having the use and purpose of the fee identified, the agency has to find a 'reasonable relationship' between the 'type' of project and both the fee's use and the need for the facility. In our case, the type of project . . . had to bear a reasonable relationship to the need for the facility and the use to which the fee would be put." (*Garrick Development Co. v. Hayward Unified School Dist., supra,* 3 Cal.App.4th at p. 334.)

Here, the City found that the mitigation fee would be used to pay for replacement of community recreational facilities which had been provided for by the land-use restrictions on the property, the opportunity for which recreational facilities would be lost by approval of the project. The City found that the recreational facilities which had been on the property included tennis courts, paddle tennis courts, swimming pool, running track, aerobics area, jacuzzi, and sauna. The City found that the value of the recreational facilities which had been on the property was $800,000, the value of the project was $10

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by providing a temporary suspension of fees, or by any other means consistent with the intent of this section. The determination by the governing body of the local agency of the means by which those revenues are to be refunded is a legislative act.

"(f) If the administrative costs of refunding unexpended or uncommitted revenues pursuant to subdivision (e) exceed the amount to be refunded, the local agency, after a public hearing, notice of which has been published pursuant to Section 6061 and posted in three prominent places within the area of the development project, may determine that the revenues shall be allocated for some other purpose for which fees are collected subject to this chapter and which serves the project on which the fee was originally imposed."

million, and the replacement cost of just four tennis courts would be approximately $280,000. The $280,000 was earmarked specifically to replace community recreational facilities. These findings are adequate and reasonable.[3] As we have already concluded, the mitigation fee and its amount had a substantial nexus to the loss of recreational facilities occasioned by the approval of the development project. There is no statutory requirement that the City specifically designate the precise nature and location of the recreational facilities to be built. Adequate safeguards for the appropriate use of the mitigation fee are contained in Government Code sections 66001 [fee as condition to approval; agency requirements], 66002 [capital improvement plan; adoption; updates; hearings] and 66006 [local agency improvement fees; public availability of account or fund information].

II. In Lieu Art Fee

In 1988, the City adopted an ordinance to establish an Art in Public Places Program. The ordinance set forth the purpose of the program: "(a) Cultural and artistic resources enhance the quality of life for individuals living in, working in and visiting the City. [¶] (b) Balanced development of cultural and artistic resources preserves and improves the quality of the urban environment and increases real property values. [¶] (c) As development and revitalization of the real property within the City continues, the opportunity for creation of cultural and

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[3] These findings are contained in the ordinance and the minutes of the City Council meeting at which the ordinance was adopted.

artistic resources is diminished. [¶] (d) As this development and revitalization continues as a result of market forces, urbanization of the community results. [¶] (e) As these opportunities are diminished and this urbanization occurs, the need to develop alternative sources for cultural and artistic outlets to improve the environment, image and character of the community is increased. [¶] (f) Development of cultural and artistic assets should be financed by those whose development and revitalization diminishes the availability of the community's resources for those opportunities and contributes to community urbanization. [¶] (g) Establishment of this Art in Public Places Program will promote the general welfare through balancing the community's physical growth and revitalization and its cultural and artistic resources."

The ordinance provided that certain development projects with a building valuation in excess of $500,000 and remodeling projects with a valuation in excess of $250,000 were required to participate in the Art in Public Places Program as a condition to approval of the project. Participation could take one of four forms at the option of the developer: (1) Art work could be placed on the project. The developer would select the art work subject to the City's approval, and the developer would be the owner of the art work. (2) The developer could choose to pay a fee in lieu of placing art work on the property. The in lieu art fee would be placed in a city art fund and used to purchase art work for display in the City. (3) The developer could post a bond in the amount of the fee. (4) The developer could donate art work to the City subject to the City's approval. In the latter three instances, the art work would belong to the City. The cost of the art work

or the in lieu art fee was to be equal to one percent of the building valuation.

The building valuation was calculated pursuant to a formula, which in the case of this development project equalled $3,322,000. Accordingly, the art cost or in lieu art fee was determined to be $33,220. Apparently, the developer elected to pay the in lieu art fee rather than place art work on his project.

As noted previously, the trial court refused to invalidate the in lieu art fee. The trial court found: "The City's police powers extend to imposing certain requirements on construction projects. For example, so long as not to the extent of a taking, the City may specify pursuant to its police powers setbacks, amount of open space to be retained, landscaping requirements, etc. Here the City has imposed a requirement of art placement or, in lieu of art placement, a fee for art at a different location. [The developer] has opted for the fee payment. This seems quite analogous to an in-lieu parkland fee. [¶] If the City can require landscaping or the planting of a tree on-site, could the City not allow instead as an option the funding of the planting of a tree or landscaping off-site? It seems that for [the developer] to invalidate the in-lieu art fee, [the developer] would have to establish that the City has no power to require art on the site. If it can require art on the site, then by analogy to the parkland fee, the City can instead allow payment of a fee for art off the site. [¶] The court finds the art fee within the scope of the City's police powers. . . . [The developer] may set a further hearing, if [he] so desires, regarding the question of the City's compliance with the proper procedure in specifying the use to

which [the developer's] fee shall be put and the steps taken to ensure that proper use."

The developer contends the in lieu art fee must be invalidated for the following reasons: the City did not comply with Government Code section 66000 et seq.; the in lieu art fee is an illegal permit condition; the in lieu art fee is an unconstitutional special tax; and the in lieu art fee violates his first amendment right to free speech.

The Art in Public Places Program of the City is unlike typical permit conditions in many respects. On the one hand, it is very similar to landscaping, parking, and lighting conditions, which require a developer to include certain design elements in a project. There can be no question that such permit conditions are legitimate exercises of a city's police powers, provided the conditions are reasonable. Ordinarily, however, these conditions cannot be met by off-site improvements or in lieu fees.

On the other hand, the in lieu art fee provision is similar to a parkland dedication requirement by which a developer must either dedicate to the local agency land for parks or pay a fee in lieu of that dedication. There is also no question that such parkland dedication requirements are valid permit conditions. (*Associated Home Builders, Etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633.) The in lieu art fee is, however, unlike an in lieu parkland fee in one very important respect. As to parklands, the developer has two options, both of which require the developer to give something to the local agency, either land or a fee. In the case of the in lieu art fee, the developer has several options. Under one option, the developer may place art valued at a certain amount

on the project and the developer continues as the owner of the art. Under this option, the developer gives nothing to the City. Only if the developer chooses, may the developer donate art to the City, pay a fee in lieu, or post a bond in lieu. Under these options, the developer pays a fee to the City.

We agree with the trial court that it is within the City's police powers to require art to be placed on developments as a condition of approval. (Cf. *Agins v. City of Tiburon* (1980) 447 U.S. 255 [scenic zoning]; *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. 104 [landmark preservation]; *Euclid v. Ambler Co.* (1926) 272 U.S. 365 [residential zoning]; Gov. Code, § 15813 et seq. [art in public buildings].) Such a requirement does not constitute an exaction, a development fee, a taking, or a tax. We further agree with the trial court that the mere giving of an option to the developer to pay a fee in lieu of the placement of art on the project does not convert the lawful permit condition into a fee, an exaction, a tax, or a taking. Here, the developer chose to pay a fee rather than place on the project art which the developer would continue to own and which would presumably add value to the project. The developer cannot now complain of his voluntary choice to pay a fee. We conclude that the fee paid by the developer in this case is not a development fee as set forth in Government Code section 66000 et seq., is not a taking of private property under *Lucas* and *Nollan,* and is not a special tax prohibited by California Constitution, article XIII A.[4]

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[4] If we were to decide these issues under the developer's analytical framework, we would conclude that the requirements

We also do not find any violation of the developer's first amendment right to freedom of speech. The developer contends his first amendment rights have been violated because he is required to pay a fee to the City for art which may express an opinion which the developer may find objectionable. As we have already noted, the developer is not required to pay a fee to the City for art. The developer could have placed art of his choosing in his project, subject only to the reasonable approval of the City. The developer could also have purchased art and donated it to the City for placement elsewhere, subject to the City's reasonable right of approval. The developer does not argue that such rights of approval violate his first amendment rights. If the developer elects to pay a fee instead of choosing the art, the developer may not then complain that his first amendment right to freedom of speech has been violated.

Finally, we conclude the in lieu art fee did not violate the developer's right to equal protection. The developer maintains that the lack of art and cultural facilities in the City is a community-wide problem, which should not be borne solely by developers of large-scale construction projects. We disagree. There is legitimate public interest in the expansion of available art and artistic creations. (Gov. Code, § 15813.) The City's Art in Public Places Program is reasonably related to the promotion of this

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of Government Code section 66000 et seq. were substantially complied with, the fee does not constitute a taking because it did not provide for a physical intrusion of the property and did not render the property valueless, and the fee is a voluntary nongeneral-revenue-generating development fee which did not constitute a special tax.

public interest. The required cost of the art to be placed in a project is reasonably related to the value of the project. (Cf. Gov. Code, § 15813 ["The Legislature recognizes that other states have enacted legislation requiring the expenditure of 1 percent of funds allocated for the construction of state buildings for works of art for such buildings."].) Frequently, landscaping of a project costs between 10 and 20 percent of the project's cost. Courts have historically upheld requirements by local agencies for various on-site improvements such as landscaping, lighting, parking, storm drains, curbs and gutters, scenic views, and open space. (E.g., *Agins v. City of Tiburon, supra,* 447 U.S. 255; *City and County of San Francisco v. Golden Gate Heights Investments* (March 3, 1993 A055754) ___ Cal.App.4th ___, [93 Daily Journal D.A.R. 4281].) Artwork warrants no different treatment. The requirement of the placement of art work on large-scale construction projects is reasonably related to a legitimate public purpose and rationally related to the construction itself. It is not for the judiciary to determine the wisdom of such a requirement. (*Garrick Development Co. v. Hayward Unified School Dist., supra,* 3 Cal.App.4th at p. 333.)[5]

III. Reinstatement of the Lien

As noted previously, in the January 8, 1990 agreement, the developer and the City agreed that the City would obtain a lien against the property as security for

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[5] Since we have concluded that both the $280,000 mitigation fee and the in lieu art fee are valid conditions of the approval of the developer's project, we need not discuss whether the developer is entitled to attorney's fees.

payment of the $280,000 mitigation fee. The City recorded such a lien on January 9, 1990. In its judgment partially granting the petition for writ of mandate dated November 8, 1990, the trial court ordered the City to set aside the $280,000 mitigation fee and remove the lien against the property. The trial court retained continuing jurisdiction over the case.

On November 15, 1990, the trial court issued a peremptory writ of mandate directing the City to take all necessary action to remove the lien and to file a return by December 17, 1990, detailing the actions taken to comply with the writ. The trial court filed a revised judgment on December 14, 1990, extending the time for removal of the lien by the City to January 7, 1991, in order to allow the City to obtain extraordinary appellate review. The trial court issued a revised peremptory writ of mandate ordering the City to take all necessary action to remove the lien by January 7, 1991. The City was also ordered to file a return to the writ by January 28, 1991.

On January 4, 1991, the City filed a notice of appeal from the December 14, 1990 revised judgment. On January 7, 1991, the City deposited with the trial court an executed but unrecorded release of the lien to be held by the trial court pending a decision on the City's appeal by this court. On January 15, 1991, the trial court ordered the court clerk to record the release of the lien. On January 17, 1991, the City filed a notice of appeal from the January 15, 1991 order of the trial court directing recordation of the release of lien. On January 25, 1991, the developer filed a notice of cross-appeal from the December 14, 1990 revised judgment. On February 11, 1991, the trial court awarded the developer sanctions against the City in the

amount of $5,804.75 for the City's bad faith tactics in connection with the release of the lien. The City did not appeal from this order. On March 20, 1991, the trial court revised the judgment to award the developer his costs and attorney's fees in the amount of $75,000. The City was given credit against this award for the amount of the sanctions previously awarded. On May 10, 1991, the City filed a notice of appeal from the revised judgment of March 20, 1991.

The City argues the trial court acted without jurisdiction when it ordered the recordation of the release of lien after the City filed a notice of appeal. We need not address this issue. That issue is moot. The lien has been released and has had no force and effect in the interim as to third parties. As a result of our decision finding that the $280,000 mitigation fee is valid, the City may reinstate the lien, however, only to the extent of any interest the developer has in the property at the time of the reinstatement. If the developer no longer has an interest in the property, the City is left to the normal procedures for the collection of judgments.

DISPOSITION

The judgment is reversed to the extent the trial court ordered the City to vacate the $280,000 mitigation fee and awarded the developer attorney's fees. The judgment is affirmed to the extent the trial court denied the petition for writ of mandate as to the in lieu art fee. The trial court is ordered to vacate its judgment (as revised) and to vacate the peremptory writ and enter a new and different judgment denying in full the petition for writ of mandate.

There has been no appeal from the sanctions order and that order is unaffected by this appeal. The matter is remanded to the trial court to determine whether, and to what extent, a lien on the property should be reinstated and for other further proceedings consistent with this opinion. The City is awarded its costs on appeal.

CERTIFIED FOR PUBLICATION.

GRIGNON, Acting P.J.

We concur:

BOREN, J.*

JACKSON, J.*

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* Assigned by the Chairperson of the Judicial Council.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RICHARD K. EHRLICH, etc., Petitioner, Respondent and Cross-Appellant, v. CITY OF CULVER CITY, et al., Respondents, Appellants, and Cross-Respondents.	))))))))))	2d Civil No. B055523 (Super. Ct. No. C730079) (Filed Jan. 25, 1993)

APPEAL from a judgment of the Superior Court of Los Angeles County. John Zebrowski, Judge. Affirmed.

Norman Y. Herring, City Attorney, Evelyn Keller and Carol Schwab, Deputy City Attorneys; Kane, Ballmer & Berkman, Joseph W. Pannone and Michael D. Montoya for Respondents, Appellants and Cross-Respondents.

Lisa S. Ehrlich, Edward J. Horowitz for Petitioner, Respondent and Cross-Appellant.

Pacific Legal Foundation, Ronald A. Zumbrun, Edward J. Connor, Jr. and Timothy A. Bittle as Amicus Curiae on behalf of Petitioner, Respondent and Cross-Appellant.

Appellants, the City of Culver City and the city council of the City of Culver City (City), appeal the trial court's invalidation of a development exaction, release of

a lien to secure payment of that exaction and an award of attorney's fees pursuant to Code of Civil Procedure section 1036.[1]

Cross-appellant Richard K. Ehrlich (Ehrlich), appeals from the imposition of a monetary exaction in the form of an "in lieu art in public places fee" as a condition for issuance of the final certificate of occupancy for a 30-unit town home development located in Culver City, California. In addition, Ehrlich appeals from the denial of attorney's fee request pursuant to Government Code section 800 and Code of Civil Procedure section 1021.5.[2]

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[1] Code of Civil Procedure section 1036 provides as follows: "In any inverse condemnation proceeding brought for the taking of any interest in real property, the court rendering judgment for the plaintiff by awarding compensation for such taking, or the attorney representing the public entity who effects a settlement of such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will, in the opinion of the court or such attorney, reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding."

[2] Government Code section 800 provides as follows: "In any civil action to appeal or review the award, finding, or other determination of any administrative proceeding under this code or under any provision of state law, except actions resulting from actions of the State Board of Control, where it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity, the complainant if he or she prevails in the civil action may collect reasonable attorney's fees, computed at one hundred dollars ($100) per hour, but not to exceed seven thousand five hundred dollars ($7,500), where he or she is personally

FACTS AND PROCEDURAL BACKGROUND

Ehrlich is trustee of the 1985 Ehrlich Family Trust and the July 28, 1965 Trust, which are the owners of the property located at 4901 Overland Avenue, Culver City, California. In 1975, Ehrlich purchased the vacant parcel. The former owner had leased the land to the city for use as a little league baseball field.

The City had zoned the parcel C-3 which included all of the uses permitted in the R-3(a) zone, specifically multifamily development and condominiums. The City, however, had previously adopted a specific plan which allowed the development of the parcel only as a recreational facility.

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obligated to pay the fees, from the public entity, in addition to any other relief granted or other costs awarded. [¶] This section is ancillary only, and shall not be construed to create a new cause of action. [¶] Refusal by a public entity or officer thereof to admit liability pursuant to a contract of insurance shall not be considered arbitrary or capricious action or conduct within the meaning of this section."

Code of Civil Procedure section 1021.5 provides as follows: "Upon motion, a court may award attorney's fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor."

Ehrlich developed the property and it was operated as a private tennis club and recreational facility continuously through August 1988. Between the time of its development and its closure in 1988, the facility was operated by five different managers, none of whom could make a business at that site profitable.

In 1981, Ehrlich requested changes to the land use restrictions to permit an office building development on the property. This request was reviewed by the City's planning commission which recommended against the change even though the commercial office building would have been consistent with the then existing C-3 zoning of that property. The request was denied by the planning commission on the grounds that the existing private tennis club facility provided needed recreational facilities for the City. Ehrlich did not pursue this request any further.

On August 30, 1988, Ehrlich closed the private tennis club as a result of continuing financial losses. After the closure of the club, and before the facility was demolished, Ehrlich donated all of the still useful club equipment to the City, including the tennis court lights, nets, lockers, and other equipment.

In 1988, Ehrlich requested changes to the land use restrictions to permit the development of 32 deluxe condominiums. The planning commission recommended approval. On April 10, 1989, the city council disapproved the changes after determining that the existing community recreational land use restrictions were needed by the community.

During the period between Ehrlich's submission of the project in September 1988 and the disapproval of the project in April 1989, the City studied the feasibility of purchasing the property for use as a public recreational facility. The City decided not to purchase the property from Ehrlich. The City also decided that it would be impossible to operate the site as a recreational facility in an economically and environmentally viable manner.

After the disapproval, Ehrlich entered into negotiations with the City in an effort to determine what conditions might be acceptable in exchange for approval of the project. Ehrlich was informed that his project would not be approved unless he agreed to pay for or build new public recreational facilities for the City.

The city council agreed to reconsider the disapproval at its August 14, 1989 meeting. The City council voted to approve the planning commission's March 8, 1989 recommendation and allow Ehrlich to build 30 deluxe condominiums. The approval included the condition that Ehrlich pay a $30,000 in-lieu park land fee pursuant to the City's Municipal Code section 33-E.1. The approval was also conditioned upon Ehrlich paying two additional fees. The first was the $280,000 fee for mitigation of the loss of needed community recreational facilities. The money was to be used solely for the construction of replacement community recreational facilities. The second fee was for $33,220 to go into the City's "art in public places" fund.

On November 3, 1989, Ehrlich filed an amended complaint for writ of mandate and complaint for declaratory relief. On January 8, 1990, Ehrlich and the City executed

an agreement whereby Ehrlich would pay the mitigation fee and allow recordation of a lien to secure payment. As a result, Ehrlich was permitted to obtain building permits and commence construction of the condominiums.

On August 14, 1990, the hearing on the petition for writ of mandate was brought before the trial court. On September 6, 1990, the trial court issued its ruling invalidating the $280,000 exaction.

On November 8, 1990, a partial judgment was entered ordering the City to remove the $280,000 lien "immediately." The peremptory writ of mandate commanding said release of lien was issued on November 19, 1990.

The City moved to set aside the partial judgment and requested a new trial. On December 12, 1990, the court issued its ruling denying the City's motion to set aside the judgment as to the mitigation fee and modified the judgment to provide that the lien be removed no later than January 7, 1991. On December 14, 1990, the revised partial judgment was entered ordering the City to release the lien against the property by January 7, 1991 (Judgment No. 1). A revised peremptory writ of mandate was issued on December 27, 1990.

On January 4, 1991, the City filed a notice of appeal and, on January 7, 1991, an executed release of lien with the superior court pursuant to Code of Civil Procedure section 917.3.[3] On January 9, 1991, Ehrlich brought an ex

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[3] Code of Civil Procedure section 917.3 provides as follows: "The perfecting of an appeal shall not stay enforcement of the

parte motion for an order to record release of lien and contempt of court for disobeying the writ.

On January 15, 1991, the trial court executed a modification to the revised partial judgment declaring the lien null and void (Judgment No. 2) and an order directing the court clerk to record the release of lien. On January 17, 1991, the City filed a notice of appeal from Judgment No. 2.

On January 30, 1991, Ehrlich filed a notice of cross appeal.

On February 8, 1991, the trial court awarded Ehrlich sanctions in the amount of $5,804.75 because the City had not removed the lien by January 7, 1991. On February 25, 1991, the trial court awarded Ehrlich costs, including attorney's fees, pursuant to Code of Civil Procedure section 1036 in the amount of $69,195.25 ($75,000 minus the amount the City paid in sanctions).

On March 20, 1991, the trial court entered a second modification to revised partial judgment (Judgment No. 3) awarding costs as sought. On May 10, 1991, the City filed an appeal of Judgment No. 3.

Since the primary issues involved in this case involve questions of law, the court may conduct an independent review of the facts and unbounded by the trial court's

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judgment or order in the trial court if the judgment or order appealed from directs the execution of one or more instruments unless the instrument or instruments are executed and deposited in the office of the clerk of the court where the original judgment or order is entered to abide the order of the reviewing court."

determination as to those issues. (*Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208, 1216.)

DISCUSSION

A. The $280.000 Exaction

The City required Ehrlich to pay $280,000 as a condition to obtaining a building permit to develop his property into 30 condominium units. We find this exaction impermissible under the law.

The argument that the City needed the $280,000 fee to mitigate the loss of needed community recreational facilities is misplaced. The private facility of Ehrlich had been shut down prior to the determination that the City needed Ehrlich to pay a substantial sum of money to compensate the City for the loss of recreational facilities that were not being used by the community. In effect, what the City was attempting to do was to force Ehrlich to reopen a business that had lost money for approximately 15 years under numerous managers. Certainly the government cannot force landowners to use their property for a particular type of business. (*Department of Public Works v. San Diego* (1932) 122 Cal.App. 159) In addition, the right not to be forced to use land for a particular business includes the right to go out of business. In *Robinson v. Diamond Housing Corporation* (D.C. Cir. 1972) 463 F.2d 853, the court stated as follows: "There would be severe constitutional problems with a rule of law which required an entrepreneur to remain in business against his will." (*Id.* at p. 867.) We believe the City is in error when it requires the specific business that may be operated on Ehrlich's land, or that it had a right to the

continued use of Ehrlich's land as a recreational facility even at a loss to its owner.

In *Agins v. City of Tiburon (Agins I)* (1979) 24 Cal.3d 266, 277, the court stated that a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property. In *Agins v. Tiburon* (*Agins II*) (1980) 447 U.S. 255, 260-261, the Supreme Court held that the application of a general zoning law to particular property effects a taking if it denies an owner economically viable use of his land.

The facts are clear that Ehrlich was denied an economically viable use of his land without the zone change. Between the time of Ehrlich's purchase of the property and its closure in 1988, the facility was operated by five different managers, without making the legally zoned business profitable. The City conducted a feasibility study and in the report dated March 29, 1989, determined that it was extremely doubtful that the facility could operate on a break-even or profitable basis without more indoor space and amenities. The report also stated that if the facility was upgraded and substantial money spent, it could make a profit if there were 5,000 members, significantly more members than ever belonged during Ehrlich's 15 years of ownership.

The City certainly could have taken Ehrlich's property under eminent domain laws and paid Ehrlich fair compensation. The City could then have legitimately used the property for recreational purposes. However, it appears that the City attempted to exact an unfair price

from one developer to help finance the City's recreational facilities.

The trial court relied on *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 and *Rohn v. City of Visalia* (1989) 214 Cal.App.3d 1463 in determining that the $280,000 exaction was not valid.

The case of *Nollan v. California Coastal Comm'n, supra,* 483 U.S. 825 involved a permit application to demolish a small bungalow, totaling 504 square feet and replace it with a larger two-story house on a privately held ocean-front lot. The new three-bedroom house would be in keeping with the rest of the neighborhood. The coastal commission found that a new house would block public views of the ocean from an inland vantage point. The commission attempted to require the Nollans to dedicate an easement allowing public use of their private beach on the ocean side of their house. (*Id.* at p. 828.)

The Supreme Court established a two-step nexus for land use exactions tied to government approvals. First, the Court requires that the circumstance of the application must be such that the government agency could deny the proposed request altogether without that denial being a taking. (*Id.* at p. 835.) In *Nollan,* the Court assumed, without deciding the issue, that this criteria was met under the facts (protecting public views was a legitimate justification for banning the Nollans' project). Second, if the outright denial of the request would not be a taking, the government may approve the request with a condition which directly furthers the goal that could have justified complete prohibition of the project. (*Id.* at p. 836.) This nexus test states: "In short, unless the permit

condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " (*Id.* at p. 837.)

In *Nollan*, the court found it "impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." (*Id.* at p. 838.)

In the case at bar, the City cannot pass either of the two parts of *Nollan*. We find no legitimate justification for banning Ehrlich's condominium project. The argument that the project would deprive the City of needed recreational facilities is without merit. Ehrlich had closed his recreational facility and certainly the City could not have forced Ehrlich to reopen the facility to provide the City with much needed recreational facilities. The $280,000 exaction was not to mitigate or reduce a harm caused by Ehrlich's project. It was the City's way to provide a public benefit at the expense of one individual. There certainly is the possibility that the 30 units would create a need for more recreational facilities. However, that is the reason that the City legally imposed the in-lieu parkland fee of $30,000. The in-lieu parkland fee was not objected to by Ehrlich and is certainly a legitimate exercise of authority by the city. The city cannot condition the building permit for the project upon Ehrlich's paying $280,000.

The City cannot pass the second part of the Nollan test. There would not have been a governmental purpose served if the project would have been banned. The City certainly would not have had the continued operation of

Ehrlich's recreational facility since it had been out of business for approximately one year prior to the City approving the project. There appears to be no recognizable legitimate governmental purpose for precluding Ehrlich from developing the property. In fact, there is a strong likelihood that a substantial governmental interest would have been served by allowing the non-used land to provide housing for several families. In addition, it is quite possible that the aesthetics of the City would have been served by the project's addition to the community. The $280,000 exaction certainly exceeds the reasonable cost of providing park and recreational activities for 30 town homes.

The City's reliance on *Gilbert v. State of California* (1990) 218 Cal.App.3d 234 is misplaced. *Gilbert* follows *Nollan* in requiring the permit condition to serve the same governmental purpose as the development ban. In *Gilbert*, it was established that the water moratorium insured a potable water supply. The denial of the operating permit resulted in the same end, a potable water supply. The *Nollan* nexus was present. (*Id.* at pp. 253-254.)

In *Rohn v. City of Visalia, supra,* 214 Cal.App.3d 1463, the City conditioned a zone change and building permit for an office building upon the dedication of 14 percent of Rohn's land to be used to correct the street alignment at the intersection where the property was located. This condition was imposed even though the City had determined that Rohn's proposed office building would generate less traffic impact than if the property were developed as multiple family dwellings as permitted by the then existing zoning. In *Rohn,* the court found that the proposed dedication bore no relationship to the use of

Rohn's property and the City could not impose it as a means of shifting the cost of a public benefit to another party. (*Id.* at pp. 1474-1476.) In *Rohn,* the street realignment was made necessary by an instance of poor planning during the original development of the intersection, and the City viewed the landowner's application for rezoning and site plan review as the "hook" it needed to acquire the property for nothing. It is quite possible that in the case at bar, the City viewed Ehrlich as the "hook" it needed to acquire needed recreational facilities at the expense of one developer.

The record is certainly devoid of evidence showing why a 30-unit condominium project creates an impact on the City requiring $280,000 of public recreational fees above and beyond the $30,000 already required of Ehrlich under the in-lieu parkland fee.[4]

B. Attorneys' Fees Pursuant to Code of Civil Procedure section 1036

The City argues that even if the mitigation fee does not meet constitutional standards as a valid development exaction, the City did not take any interest in Ehrlich's property. We disagree. The trial court decided that a taking had taken place under the test established in *Nollan.* In *Nollan,* the Supreme Court held that where a permit condition fails to substantially advance the original purpose of the building restriction, the condition becomes a plan to extort a public benefit without the

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[4] Since we find that the $280,000 fee is not justified pursuant to *Nollan,* we find it unnecessary to discuss the other arguments advanced by Ehrlich to invalidate the fee.

payment of compensation in violation of the fifth amendment. It was the City's unconstitutional imposition of the $280,000 exaction that constitutes the unlawful taking in this case. Attorney's fees and costs under Code of Civil Procedure section 1036 are mandated.

We conclude that denial of all viable use of the property is not required to an award pursuant to Code of Civil Procedure section 1036. Section 1036 requires only a taking of "any interest in real property." Interpreting the predecessor statute, section 1246.3, the courts have recognized the broad interpretation of the term "taking." In *Holtz v. San Francisco Bay Area Rapid Transit Dist.* (1976) 17 Cal.3d. 648, 653, the court commented that the Legislature intended to provide recovery for "encroachments upon lesser property interests." Also in *Holtz* the court held that a "taking" as used in the statute is less restrictive than a "taking" under California Constitution article I, section 19.[5]

C. Arts in Public Places Exaction

(1) Government Code Sections 66000 Et Seq.

Ehrlich argues that the art in public places exaction must be vacated because the City failed to comply with

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[5] Article I, section 19 provides as follows: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."

the requirements of Government Code sections 66000 et seq. We disagree. Government Code sections 66000-66009 govern fees for development projects. However, we conclude the provisions of section 66000 et seq. do not apply to the City's art in public places program.

The developer's fee statute applies to local government actions which impose a fee as a condition of approval after January 1, 1989. The art in public places program allocation is not a fee as defined in the developer's fee statute. Government Code section 66000, subdivision (b) provides in part: " 'Fee' means a monetary exaction, other than a tax or special assessment, which is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project. . . . " The language is clear that a developer fee involves a monetary exaction. That is not the case in the City's arts in public places exaction. The program allows the developer the option of placing art on the project site, or at the developer's option, paying a fee in lieu of placing the art work on the project. The trial court correctly used the analogy to a landscaping requirement for a project. It would appear reasonable that if a City could impose a requirement of landscaping on a project, the City could also impose a requirement of some sort of art to be placed on the project. Ehrlich elected not to place the art on the project and cannot now complain concerning the monetary exaction the City imposed pursuant to its art in public places ordinance.

The developer's fees statutes expressly excludes the in-lieu parkland fees which may be imposed on a development pursuant to Government Code section 66477. The in-lieu art fee is very similar to an in-lieu parkland fee. Under either an in-lieu parkland fee or an in-lieu art fee, the fees are only paid upon the developer's election. The trial court concluded that Ehrlich elected to pay the fee in lieu of placement of art.

We do not believe that the art in public places program results in a possessory taking of land. The art program did not require any public dedication of land. According to City's ordinance section 33H-31(a) any art work installed by the property owner belongs to the property owner.

(2) Legitimate Exercise of the Police Power of City

There are legitimate public interests in the pursuit of art and artistic creations. In 1976, the Legislature adopted the "Art in Public Buildings Program."[6] In addition, in 1979 and in 1982, the Legislature enacted statutes designed to preserve works of art by the adoption of Civil Code sections 987 and 989. The adoption of the art in public places program by the City in 1988 was certainly

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[6] Government Code section 15813 provides as follows: "The Legislature finds and declares that the State of California has a responsibility for expanding public experience with art. The Legislature recognizes that other states have enacted legislation requiring the expenditure of 1 percent of funds allocated for the construction of state buildings for works of art for such buildings."

the type of program envisioned by the Legislature and was certainly within the legitimate police powers of the City. Even in *Nollan, supra,* 483 U.S. at p. 835, Justice Scalia, reaffirmed that there is a wide range of legitimate government interests.

It is not our duty to look at the wisdom of the City when it enacted the arts in public place ordinance or to determine if the providing of art in an urban environment will enhance the quality of life, health, or welfare. In *Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, the court upheld the imposition of school fees pursuant to Government Code sections 53080 and 65995. In *Garrick,* there was a criticism of using permanent construction as opposed to less costly, movable structures. However, the court said the choice between the two was one for the school district and their wisdom was not to be second-guessed. (*Id.* at p. 333.) While we may believe that there may be other ways to fulfill the purpose of the arts in-lieu ordinance, it passes constitutional muster and our inquiry stops there.

Ehrlich's argument concerning the one percent allocation of the ordinance is without merit. This cost is consistent with the Legislature's recognition of the one percent in the Art in Public Buildings Program. (Gov. Code, § 15813.) This certainly appears to be a reasonable figure for the developer if the developer elects not to place art work on the property himself. One percent is certainly substantially less than is frequently required for landscaping.

(3) Special Tax

Ehrlich also argues that the art in public places program is a special tax imposed without a two-thirds vote of the electorate. We disagree. The arts in public places ordinance is not a way for the City to replace revenue lost as a result of Proposition 13. There was no revenue producing function by the City's art in public place program. All developments that are subject to the program have the choice of placing artwork on the property and they will be the owners of the artwork. If all developers were to choose this option, it could hardly be argued that the program would be a special tax and prohibited without the vote of two-thirds of the citizens. We believe that if the City would have wanted the program to be revenue producing, it would not have been designed as a program that provided the in-lieu option.

As the City pointed out correctly in their brief, the City's art in public places allocation is related to the increased needs created by the condominiums and is similar to the rationale underlying the park dedication for subdivisions sustained in *Associated Home Builders Etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633.[7]

D. Attorney's Fees

Ehrlich requested an award of attorney's fees pursuant to Government Code section 800 and Code of Civil

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[7] We also reject Ehrlich's argument that the ordinance violates his free speech. The developer determines the art work to be used, subject to very limited input by the City.

Procedure section 1021.5. The trial court denied Ehrlich's request and found that "[t]hese issues are not so clear as to justify imposition of fees." We do not find an abuse of discretion in the denying of attorney's fees pursuant to these sections.

In *Kreutzer v. County of San Diego* (1984) 153 Cal.App.3d 62, 78, the court held that the determination of whether an action is arbitrary or capricious is essentially one of fact and is within the sound discretion of the trial court. In *Forrest v. Trustees of Cal. State University & Colleges* (1984) 160 Cal.App.3d 357, 368, the court determined that the question of arbitrary or capricious is a question of fact and the decision of the court will be sustained on appeal unless an abuse of discretion is shown.

The decision as to whether attorney's fees are warranted pursuant to Code of Civil Procedure section 1021.5 rests within the sound discretion of the trial court. (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142.) There was a proper basis for the trial court to deny attorney's fees to Ehrlich. While Ehrlich was certainly the prevailing party as to the $280,000 mitigation fee, the trial court still did not grant attorney's fees under either section. Under Code of Civil Procedure section 1021.5, the denial was proper because the trial court may not award attorney's fees if there is a significant private benefit, as opposed to a public one. Certainly Ehrlich's purpose in fighting the $280,000 fee was for his own pecuniary interest and the Code of Civil Procedure section was not designed to reward litigants motivated by their own pecuniary interest. (*Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 113-115.)

E. Reinstatement of the Lien

City filed their notice of appeal and deposit of release of lien pending decision of the Court of Appeal. The City argues that with the filing of that notice of appeal and deposit of release of lien, jurisdiction over those issues determined by the court on December 14, 1990 was removed to the Court of Appeal. We disagree.

The law provides that the trial court may provide that its order granting a writ of mandate is not stayed pending appeal.[8]

The superior court found irreparable damage.[9] The City incorrectly relies on Code of Civil Procedure section

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[8] Code of Civil Procedure section 1110b provides as follows: "If an appeal be taken from an order or judgment granting a writ of mandate the court granting the writ, or the appellate court, may direct that the appeal shall not operate as a stay of execution if it is satisfied upon the showing made by the petitioner that he will suffer irreparable damage in his business or profession if the execution is stayed."

[9] The minute order of the court dated December 12, 1990 stated: "The judgment requires release of the lien imposed to secure the tennis court exaction. That provision of the judgment is appropriate inasmuch as the exaction, and hence the lien, has been ruled invalid after trial. The judgment will be modified, however, to provide that the lien securing the tennis court exaction must be removed no later than 1/7/90 [1/7/91] in order to allow time for the City to seek appellate court action on this point before the lien is removed. If, after removal of the lien, the tennis court exaction is reimposed by the appellate courts, the City can still collect the amount imposed from petitioner; no indication to the contrary appears. The amount of the exaction should not constitute a lien on the condominiums which by that time will likely be owned by third party purchasers. Nor should the City be able to thwart success of the project by frustrating

917.3. Section 917.3 only applies "if the judgment or order appealed from directs the execution of one or more instruments. . . . " The minute order or the partial judgment or the writ did not direct the execution of any particular instrument, just the removal of the lien by January 7, 1991.

The revised partial judgment was not stayed by the notice of appeal filed by the City and the trial court properly ordered release of the lien.

DISPOSITION

The judgment is affirmed. Each party to pay their own costs.

NOT TO BE PUBLISHED

JACKSON, J.*

We concur:

BOREN, Acting P. J.

GRIGNON, J.

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sales by clouding petitioner's title to the project with a lien that has been ruled, after trial, invalid."

(*Assigned by the Chairperson of the Judicial Council.)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 85

DATE September 6, 1990

HONORABLE JOHN ZEBROWSKI JUDGE

HONORABLE JUDGE PRO TEM

2. Deputy Sheriff

S. MCCALL DEPUTY CLERK ___

ELECTRONIC RECORDING MONITOR

NONE

Reporter
(Parties and counsel checked if present)

C 730 079
Richard K. Ehrlich, etc., Counsel for Plaintiff

vs
City of Culver City, et al., Counsel for Defendant

NATURE OF PROCEEDINGS.

PETITION FOR WRIT OF MANDATE

In this matter heretofore submitted on August 14, 1990, the court announces its decision as follows:

I. The Tennis Court ($280,000) Exaction:

1. Petitioner is building a condominium project which will presumably bring additional residents to the area. Petitioner may therefore be assessed with an in-lieu parkland fee – this seems not to be disputed. *See also,*

regarding parkland exactions, *Associated Homebuilders v. City of Walnut Creek*, 4 C3 630 (1971).

2. Important here is that it be clear that in issue here is *not* an in-lieu parkland fee, but rather an additional fee above the in-lieu parkland fee. The stated purpose of this additional fee is to "replace" tennis courts no longer available in the community due to the closing of petitioner's private tennis club.

3. Petitioner's club (although most likely a public accommodation for civil rights purposes) was at all times private property; the city never owned any interest in it nor was any part of it ever dedicated to public use. It is conceded that petitioner had no obligation to maintain his facility available for public use, but rather that petitioner retained the right to exclude the public from his premises. It is true that the public accommodation laws would essentially require petitioner to make the facilities available to the public generally so long as the premises were operated as a business, but there was no requirement that petitioner operate the premises as a business. Instead, petitioner was at all times free to go out of business, which he in fact did.

4. This situation is controlled by *Nollan v. Coastal Commission* and *Rohn v. City of Visalia*. In *Rohn*, a California appellate case following *Nollan*, the court noted:

> " . . . A grant of public privilege, such as a building permit, may not be conditioned upon the deprivation of constitutional protections . . . An arbitrarily conceived exaction will be nullified as a disguised attempt to take private property for public use without resort to eminent domain or as a mask for discriminatory

> taxation . . . If the applicant must donate property for a public use that bears no relationship to the benefit conferred on the applicant or the burden imposed on the public, there is a taking of property . . . "
>
> " . . . Where the conditions imposed are not reasonably related to the landowner's proposed use, but are imposed by the public entity to shift the burden of providing the cost of a public benefit to one not responsible, or only remotely or speculatively benefitting from it, there is an unreasonable exercise of police power."

5. Here, the property owner's action in developing a condominium project will likely create a need for more public recreation facilities in the area, but that is already addressed by the in-lieu parkland fee. There is otherwise no reasonable relation, within the requirements of *Nollan* and *Rohn*, between the petitioner's project and the need for public tennis courts in Culver City.

6. In *Nollan*, the issuance of the permit allowed construction of a house which would impair the public view of the public beach. Conditions designed to maintain the view or to mitigate its obstruction were therefore found permissible. Conditions unrelated to the obstruction of the view, in particular the requirement of the granting of a lateral easement along the beach and unrelated to the view, were not permissible.

7. The exaction of money instead of land is different in kind but not principle. In this case, petitioner's actions cannot legally be said to deprive the City of tennis courts, because neither did petitioner have an affirmative duty to provide tennis courts to the City or its residents nor

would tennis courts necessarily be available to the City but for petitioner's project (petitioner was at all times free to discontinue business as a tennis club, and in fact did so). The City's proposed exaction is – as discussed in *Rohn* – simply an effort to shift the cost of providing a public benefit to one no more responsible for the need than any other taxpayer.

8. The City could have condemned a portion of petitioner's property for use as City tennis courts, but the City would then of course have had to pay for the land. Here, instead of taking land for which it would have had to pay, the City proposes to take not land but money. This is equally impermissible.

9. Petition for writ of mandate granted as to the $280,000 tennis court exaction on grounds (b), (c) in the sense that the exaction constitutes an unequal tax discriminatorily applied, and that portion of (e) stating that the exaction constitutes a taking of private property without compensation. Petitioner to prepare order and judgment consistent with this order with return date in approximately 60 days.

II. The "Art in Public Places" Exaction:

1. The City's police powers extend to imposing certain requirements on construction projects. For example, so long as not to the extent of a taking, the City may specify pursuant to its police powers setbacks, amount of open space to be retained, landscaping requirements, etc. Here the City has imposed a requirement of art placement or, in lieu of art placement, a fee for art at a

different location. Petitioner has opted for the fee payment. This seems quite analogous to an in-lieu parkland fee.

2. If the City can require landscaping or the planting of a tree on-site, could the City not allow instead as an option the funding of the planting of a tree or landscaping off-site? It seems that for petitioner to invalidate the in-lieu art fee, petitioner would have to establish that the City has no power to require art on the site. If it can require art on the site, then by analogy to the parkland fee, the City can instead allow payment of a fee for art off the site.

3. The court does not reach the issue of the City's demand for an easement for viewing of art placed on site, since the on-site art option is not the option involved here. It if were, the easement portion of the requirement might be invalidated without invalidating the requirement for placement of art visible from off-site.

4. The court finds the art fee within the scope of the City's police powers and the petition for writ of mandate invalidating the art exaction is therefore denied. Petitioner may set a further hearing, if petitioner so desires, regarding the question of the City's compliance with proper procedure in specifying the use to which petitioner's art fee shall be put and the steps taken to ensure that proper use.

III. Attorney's Fees:

Attorney's fees are denied. These issues are not so clear as to justify imposition of fees.

A copy of this minute order is sent via U. S. Mail this date to counsel for all appearing parties as shown:

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Carol A. Schwab, Deputy City Attorney
Evelyn Keller, Deputy City Attorney
4095 Overland Avenue
Culver City, California 90232-0507

Second Appellate District, Division Five, No B055523
SO33642

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

RICHARD K. EHRLICH, Appellant

v.

THE CITY OF CULVER CITY Et Al., Appellants

(Filed Aug. 26, 1993)

Petition for review DENIED.

Panelli, J. is of the opinion the petition should be granted. The request for an order directing depublication of the opinion is denied.

Lucas
Chief Justice

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 5 DATE: 06/23/93

Lisa Ehrlich
901a North Pac. Coast Hwy
Suite 200
Redondo Beach, CA. 90277

RE: Ehrlich, Richard K.
vs.
Culver City, City of
2 Civil B055523
Los Angeles NO. C730079

THE COURT:
Petition for rehearing denied.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RICHARD K. EHRLICH, etc., Plaintiff, Respondent and Appellant, vs. THE CITY OF CULVER CITY, et al., Defendant, Appellant and Respondent.	B055523 (Super. Ct. No. C730079 ORDER (Filed Mar. 30, 1993)

THE COURT:

The court having granted petition for rehearing on February 22, 1993, IT IS HEREBY ORDERED that the above-entitled matter is resubmitted as of February 22, 1993.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 5 DATE: 02/22/93

Edward J. Horowitz
11661 San Vicente Blvd
Suite 1015
Los Angeles, CA. 90049

RE: Ehrlich, Richard K.
vs.
Culver City, City of
2 Civil B055523
Los Angeles NO. C730079

THE COURT:

APPELLANTS' REHEARING PETITION GRANTED.

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2 Civil B 05523

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RICHARD K. EHRLICH Respondent/Cross Appellant v. THE CITY OF CULVER CITY, et. al., Appellants/Cross Respondents.	B055523 Super. Ct. No. C730079) (Filed June 9, 1993)

Appeal from the Los Angeles
County Superior Court
The Honorable John Zebrowski, Judge

RESPONDENT'S PETITION FOR REHEARING

Lisa S. Ehrlich
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Attorney for Respondent
Richard K. Ehrlich

INTRODUCTION

Respondent and Cross-Appellant Richard K. Ehrlich ("Ehrlich") seeks rehearing of the Court's opinion on rehearing filed May 25, 1993 and reinstatement of the Court's opinion filed January 25, 1993. This Petition is brought pursuant to California Rule of Court 29. The bases for this Petition are as follows:

1. Misstatements of fact regarding the imposition of the original land use regulations on the site; and

2. Omissions and misstatements of fact regarding the economic and environmental viability of recreational facilities at the subject site.

Specifically, the Court misunderstands the origin, nature and effect of the Specific Plan which the City imposed on the subject site. As a result, the Court has reached incorrect factual conclusions which are central to the Court's opinion. When the true facts are known, the rationale of the Court's opinion in this case disappears. Ehrlich respectfully submits, that absent these misunderstandings of fact, the Court would not have changed its first ruling in this case affirming the trial court's decision invalidating the $280,000.00 exaction.

DISCUSSION

I.

THE $280,000 WAS NOT TO MITIGATE THE LOSS OF NEEDED RECREATION FACILITIES

The rationale of the Court's opinion rests upon the City's contention that the $280,000 was required to promote the purpose of the Specific Plan, ie. to insure the

existence and/or mitigate the loss of *needed* recreational facilities. The Specific Plan, however, was not adopted by the City to insure that City would be provided with needed recreational facilities, but rather to assuage surrounding neighbors who were vehemently opposed to the use of the site for any type of recreational facility, and to *"mitigate any adverse effects which might otherwise occur" due to the construction of Ehrlich's recreational facility on the site and to insure that no other C-3 uses, including recreational facilities other than Ehrlich's recreational facility would be constructed and/or operated on the site.* C.T. 497, 486, 491, 502, 499-513.

Consequently, the purpose of the Specific Plan is not promoted by the imposition of a "mitigation fee" to offset the loss of *needed* recreational facilities in the City. In truth, all of the arguments validating the $280,000.00 proffered by the City are mere subterfuge to mask the City's true intent to extort from Ehrlich a portion of the estimated $10,000,000 value of the townhome project.

II.

THE SPECIFIC PLAN CONSTITUTES A TAKING

The Court's opinion appears to express an assumption that the Specific Plan permitted Ehrlich to make alterations to his facility which might have permitted the profitable operation of some recreational facility on the site. The Specific Plan, however, prohibits the alteration of the recreational facility in any way. C.T. 497, 486, 491, 502, 499-513.

By its own terms, the Specific Plan does not permit the operation of any recreational facility on the subject site. To the contrary, *development and operation of a recreational facility was limited to the exact facility which Ehrlich and countless others had attempted to operate on the site for 12 years.* C.T. 485-513.

By incorporating the site plan of the existing recreational facility into the Specific Plan, the Specific Plan, in effect, dictates the exact nature, including size, placement, type and location, of each improvement down to the last tree. Changes to Ehrlich's facility were expressly prohibited. Any alteration of the improvements without amendment or removal of the Specific Plan would be unlawful and result in closing of the facility as well as other civil and/or criminal penalties.

In its first ruling, the Court correctly stated that the Specific Plan and the City's refusal to remove its limitations denied Ehrlich of all economically viable use of the subject site and constituted a taking. In support of this conclusion, this Court cited the findings contained in the feasibility study commissioned by the City to wit: *It was extremely doubtful that the facility could operate at on a break-even or profitable basis in accordance with the layout mandated by the Specific Plan. A viable recreational facility would require substantial changes to the building structure and lay-out of the facility, including removal of various tennis courts, destruction of the existing building, and addition of at least 50 parking spaces requiring acquisition of space from neighboring properties, all at a substantial expense.* C.T. 1136-1143, 1147, 1152, 1154-1156, 1166-1167, 1196-1199. The "circumstances" cited in the record which might provide for the profitable operation of a recreational facility on the site

are therefore not available in this case. Consequently, the Specific Plan denies Ehrlich all economically beneficial use of his property.

III.

THE SPECIFIC PLAN LIMITATIONS DID NOT EXIST AT THE TIME EHRLICH PURCHASED THE PROPERTY

In its Petition for Rehearing, the City has knowingly misled this Court by *intentionally* omitting material facts in order to misrepresent evidence contained in the record. The City is well aware that in September 1973, Ehrlich as president of and on behalf of Downtown Development Corporation ("DDC") entered into an agreement to purchase the subject site from Mary Jane Brown aka Mary Jane Malone, Shiela Ann Malone, Anna Marie Rehm and Evelyn K. Carrington. Subsequent thereto, in early 1974, in connection with the development of Ehrlich's recreational facility and on behalf of DDC, Ehrlich submitted a site plan to the City for approval. The City has this application in its files and is well aware that Ehrlich was acting on behalf of DDC. C.T. 485-495. Ehrlich appeared at numerous planning commission and City council meetings to answer questions and concerns of neighboring homeowners who vehemently opposed the use of the site as a recreational facility of any kind. C.T. 496, 499. The purchase of the subject property was finalized in January, 1975, with title being vested in Ehrlich rather than DDC, one month prior to the February 1975 Specific Plan Amendment. C.T. 160, 510-512.

The Specific Plan was not part of the bundle of "investment backed expectations" which Ehrlich and

DDC purchased when it entered into the purchase agreement in 1973. The Specific Plan was adopted in August 1974 by the City Council in lieu of the usual and customary procedure of site plan review. (The site plan review process does not impose by ordinance permanent limitations on the use of property.) The Specific Plan prohibited the use of the site for anything but Ehrlich's recreational facility. C.T. 486.

This is exactly the kind of over-restrictive and abusive zoning of which Justice Scalia warns in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 837, 107 S.Ct. 3141, 97 L.Ed.2d 677;

> "One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulations which the state then waives to accomplish other purposes, leading to lesser realization of the land use goals purportedly sought to be served than would result from more lenient (but non-tradeable) development restrictions . . . "

The scheme adopted by the City in this case is exactly identical to that described by Justice Scalia. The Court's opinion permits and encourages a City to over regulate property and then exact extortion monies from developers to buy their way out of the overweening restrictions. This is especially true if the Court permits the City to concoct, ex post facto, justifications for legislation which did not originally exist. If this is allowed, then *Nollan* no longer exists.

IV.

CONCLUSION

For all the foregoing reasons, Ehrlich respectfully requests that a rehearing be granted and that the opinion be modified to affirm the trial court's holding invalidating the $280,000.00 and awarding attorneys, fees pursuant to Section 1036.

Dated: June 8, 1993 By: /s/ Lisa S. Ehrlich
LISA S. EHRLICH
Attorney for Respondent

2 Civil B 055523

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RICHARD K. EHRLICH, etc.,

Respondent/Cross-Appellant.

vs.

THE CITY OF CULVER CITY, et al.,

Appellants/Cross-Respondents

Appeal from the Los Angeles County Superior Court
The Honorable John Zebrowski, Judge

APPELLANTS' ANSWER TO RESPONDENTS' PETITION FOR REHEARING

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Attorneys for Appellants

DISCUSSION

Appellants (Culver City[1]) are compelled to file this Answer to Respondents' Petition for Rehearing to dispute the allegations of misrepresentation set forth in the Petition in Section III (at unnumbered pages 4 and 5). These allegations, as well as all the grounds upon which Respondents' rely are unfounded.

Because the record shows the applicant for the Specific Plan was the Downtown Development Corporation [CT 485], the assumption was made, by Culver City's counsel, such applicant was Richard K. Ehrlich's predecessor in interest. However, even if Respondents' current representation of the facts is correct[2], this does not change the ultimate fact that the two family trusts, which were the owners of the subject property at the time the Mitigation Fee was levied, obtained their interest in such property, subject to the recreational facility land use restriction.

The owners of the subject property at the time Culver City granted the subject zone change and other land use approvals, including the imposition of the Mitigation Fee, were the 1985 Ehrlich Family Trust and the July 28, 1965 Trust, with Richard K. Ehrlich acting as trustee, CT 160: 3-6; Declaration of Richard K. Ehrlich. Their predecessor in interest was Richard K. Ehrlich. CT 160: 7-9.

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[1] All capitalized references shall be as defined in Appellants' Opening Brief.

[2] Respondents, at unnumbered page 1 of its answer to Culver City's Petition for Rehearing, claimed, "In the petition, *no new facts are presented to the Court.*" Emphasis original.

> At the time [Richard K. Ehrlich] finalized [his] purchase of [the subject] property, the City had recently adopted a specific plan for that property which allowed only for the development of that property as a private tennis club and recreational facility.

CT 160: 10-13; Declaration of Richard K. Ehrlich.

Further, even Respondents' current representation of the facts shows the Trusts' trustee (Richard K. Ehrlich) had full knowledge of, participated in and accepted the adoption of the Specific Plan. These facts alone support a determination that *both* the Trusts' and Richard K. Ehrlich's investment-backed expectations coincided with the recreational use restrictions on the subject property.

Based upon all the foregoing, this Court is respectfully requested to deny Respondents' request for rehearing.

Dated: June 15, 1993

Respectfully Submitted,

NORMAN Y. HERRING,
CITY ATTORNEY
City of Culver City
KANE, BALLMER & BERKMAN

By: /s/ Joseph W. Pannone
Joseph W. Pannone,
Attorneys for Appellants

ORDINANCE NO. 89-026

AN ORDINANCE OF THE CITY OF CULVER CITY, CALIFORNIA, AMENDING SECTION 37-4 OF THE CULVER CITY MUNICIPAL CODE BY RECLASSIFYING PROPERTY LOCATED AT 4901 OVERLAND AVENUE FROM THE CURRENT COMMERCIAL (C-3) ZONE WITH SPECIFIC PLAN SP-1-74, AS AMENDED, TO A LOW DENSITY MULTIPLE FAMILY DWELLING (R-3A) ZONE; AND ADOPTING SPECIFIC PLAN, SP NO. 88-02, FOR DEVELOPMENT OF A 30-UNIT TOWNHOUSE CONDOMINIUM COMPLEX SUBJECT TO CERTAIN CONDITIONS.

WHEREAS, the Planning Commission, after due notice as required by law, held a public hearing on the applications of Richard K. Ehrlich to rezone the subject property under Zone Change, ZC No. 88-04, and Specific Plan, SP No. 88-02, in conjunction with an application for a General Plan Amendment, GPA No. 88-02, and Tentative Tract Map No. 47016, TTM No. 88-04, and related application for Design and Physical Development Plan Amendment, DPDPA No. 88-02;

WHEREAS, the Planning Commission, after due notice as required by law, held hearings on the application of Richard K. Ehrlich for General Plan Amendment, GPA No. 88-02, in conjunction with a request for a change of zone, Zone Change, ZC No. 88-04, Specific Plan, SP No. 88-02, and Tentative Tract Map No. 47016, TTM No. 88-04, and related application for Design and Physical Development Plan Amendment, DPDPA No. 88-02;

WHEREAS, the property is identified as a two and four-tenth acre (2.4±) site located at 4901 Overland Avenue, being a certain portion of the Rancho La Ballona

tract, and is currently designated with a Commercial designation in the Land Use Element of the General Plan;

WHEREAS, the Planning Commission held duly noticed public hearings on the applications on January 11, 1989 and March 8, 1989, and, at the conclusion thereof, adopted Resolution No. 89-P004, approving and recommending City Council approval of the application to rezone the above-referenced property to a low density multiple family (R-3a) Zone, and adopted Resolution No. 89-P011, approving and recommending to the City Council approval of Specific Plan, SP No. 88-02 subject to certain conditions;

WHEREAS, after due notice as required by law, hearings were held by the City Council on April 10, 1989 and August 14, 1989, and all interested persons were given an opportunity to be heard;

WHEREAS, it appears to the City Council that the change of zone and adoption of Specific Plan, as recommended by the Planning Commission, is in the public interest and should be approved; and

WHEREAS, pursuant to the foregoing recitations, the following findings are made:

(a) All necessary preliminary proceedings have been held covering the proposed zoning of an adoption of Specific Plan for the property hereinafter described; that due notice has been given to the property owners, and that opportunity has been afforded to all interested persons to be heard both for and against the proposed zoning and Specific Plan, in hearings before the Planning Commission and the City Council.

(b) The proposed zoning of and adoption of the Specific Plan for the property hereinafter described is in the public interest; the change of zone will, in conjunction with the Specific Plan and all its conditions, control the specific kind and intensity of residential development permitted on this site; and the public necessity, convenience, general welfare and good zoning practice justifies the change of zone and adoption of Specific Plan.

(c) The proposed reclassification will not be detrimental to the public welfare nor to the property of other persons located in the vicinity thereof; the change of zone and the Specific Plan with all its conditions will not adversely affect the comprehensive general plan, as approved in the related General Plan Amendment GPA No. 88-02; the change of zone and The Specific Plan with all its conditions are consistent with the residential neighborhood now existing on the northwest and the southeast side of the site.

(d) The change of zone and adoption of the approved Specific Plan with all its conditions will control the specific kind and intensity of residential uses permitted on this property; it provides additional housing in a job rich area; it provides an aesthetic reuse of property which has had a history of misuse detrimental to the immediately surrounding neighborhood; and it provides for mitigation of the loss of needed community recreational facilities.

(e) In compliance with the requirements of the California Environmental Quality Act of 1970, as subsequently amended, and based upon staff's "Inital Study" of the environmental impacts of this project, the City Council, acting

as the "lead agency" hereby determines the proposal could not have a significant impact on the environment, and therefore, adopts a negative declaration and directs a Notice of Determination be prepared and filed with the Los Angeles County Clerk.

NOW THEREFORE, The City Council of the City of Culver City, California, DOES HEREBY ORDAIN as follows:

SECTION 1. The property consisting of that portion of the Rancho La Ballona, in the City of Culver City, in the Country [sic] of Los Angeles, State of California, described as set forth in Exhibits A and B attached hereto and incorporated by reference herein, located at 4901 Overland Avenue, is hereby rezoned from Commercial (C-3) to a Low Density Multiple Family Dwelling (R-3a) Zone. The Zoning Map of the City of Culver City, included in Section 37-4 of the Culver City Municipal Code, is hereby amended to show such reclassification and rezoning, and the portion of the map as amended is hereby made a part of the map.

SECTION 2. Specific Plan, SP No. 88-02, is hereby approved as recommended by the Culver City Planning Commission, as set forth in Resolution No. 89-P011, and further subject to the following condition:

(1) Unless the developer has obtained a building permit for and commences construction of the 30-unit townhouse condominium complex per the plans file dated March 1, 1989, within the one year period following November 1, 1989, or such extensions as may be granted by the City Council in its sole and absolute discretion, the developer shall not be permitted to

commence construction of the 30-unit townhouse condominium units until a site plan review approval is obtained and shall not be permitted to change the project without obtaining a modification of the Specific Plan, SP No. 8-04.

(2) Condition No. V is added as follows: "V. Prior to issuance of any temporary or final Certificate of Occupancy for the proposed project, the developer shall pay to the City the amount of $280,000.00 to be used for additional recreational facilities as directed by the City Council."

SECTION 3. This Ordinance shall take effect thirty-one (31) days from the date of its adoption and prior to the expiration of fifteen (15) days from the adoption hereof the City Clerk shall cause this Ordinance to be published in the Culver City News.

APPROVED and ADOPTED this 11th day of September, 1989.

/s/ Richard Alexander
RICHARD ALEXANDER,
VICE MAYOR
City of Culver City,
California

ATTEST:

/s/ Pauline C. Dolce
PAULINE C. DOLCE,
City Clerk

APPROVED AS TO FORM:

/s/ Joseph W. Pannone
JOSEPH W. PANNONE
City Attorney

ORDINANCE NO. 88-019

AN ORDINANCE OF THE CITY OF CULVER CITY, CALIFORNIA, ADDING ARTICLE II TO CHAPTER 33H (COMMENCING WITH SECTION 33H-20) TO ESTABLISH AN ART IN PUBLIC PLACES PROGRAM, AND RESERVING SECTIONS 33H-12 THROUGH 33H-19, INCLUSIVE, FOR FUTURE USE.

The City Council of the City of Culver City, California, DOES HEREBY ORDAIN as follows:

SECTION 1. Sections 33H-12 through 33H-19, inclusive, of the Culver City Municipal Code are hereby reserved for future use.

SECTION 2. Article II is hereby added to Chapter 33H to read:

ARTICLE II

ART IN PUBLIC PLACES

Section 33H-20. Purpose.

The City Council finds and declares:

(a) Cultural and artistic resources enhance the quality of life for individuals living in, working in and visiting the City.

(b) Balanced development of cultural and artistic resources preserves and improves the quality of the urban environment and increases real property values.

(c) As development and revitalization of the real property within the City continues, the opportunity for creation of cultural and artistic resources is diminished.

(d) As this development and revitalization continues as a result of market forces, urbanization of the community results.

(e) As these opportunities are diminished and this urbanization occurs, the need to develop alternative sources for cultural and artistic outlets to improve the environment, image and character of the community is increased.

(f) Development of cultural and artistic assets should be financed by those whose development and revitalization diminishes the availability of the community's resources for those opportunities and contributes to community urbanization.

(g) Establishment of this Art in Public Places Program will promote the general welfare through balancing the community's physical growth and revitalization and its cultural and artistic resources.

Section 33H-21. Culver City Arts Committee Established.

There shall be a Culver City Arts Committee to fulfill the duties established in this Article. The City Council may prescribe, by resolution, other duties, and the qualifications of and appointment process for the members of the Committee.

Section 33H-22. Fund Created.

(a) There is hereby created a fund to be known as the "City Art Fund" to account for fees paid pursuant to this Article. This fund shall be maintained by the City Treasurer, and

shall be used solely for the acquisition, installation, improvement, maintenance and insurance of art work to be displayed in the City.

(b) For a period of five years from the effective date of this Article, only expenditures for physical art as defined in Section 33H-30(a) shall be permitted.

Section 33H-23. Applicability.

(a) All new residential development of more than four units, and all commercial, industrial, and public building development projects, with a building valuation exceeding $500,000.00 shall be subject to the provisions of this Article, provided that the value of a residential unit covenanted for low- or moderate-income households, or for senior citizens shall not be included when determining the value of a residential development.

(b) Including but not limited to exterior and interior modifications and additions, all remodelling [sic] of existing residential buildings of more than four units, and all remodelling [sic] of existing commercial, industrial and public buildings, shall be subject to the provisions of this Article when such remodelling [sic] has a valuation exceeding $250,000.00, excluding earthquake rehabilitation required by this Code for seismic safety. As used herein, the value of a residential unit covenanted for low- or moderate-income households or for senior citizens shall not be included when determining the value of a residential development.

Section 33H-24. Certificates of Occupancy.

(a) No final City approval, such as final inspection or a Certificate of Occupancy, for any project subject to this Article shall be granted or issued unless and until full compliance with the Art in Public Places Program is achieved, in one or more of the following ways:

(1) The approved art work has been placed in a matter satisfactory to the Community Development Director.

(2) In lieu art fees have been paid.

(3) Financial security in an amount equal to the acquisition and installation costs of an approved art work, in a form approved by the City Attorney, has been posted.

(4) Donation of an approved art work has been accepted by the City Council.

(b) For the purposes of this subsection (a), "full compliance with the Art in Public Places Program" shall not be found until the entire program allocation required by Section 33H-25 for the project has been satisfied.

(c) If any approved art work placed on private property pursuant to this Article is removed without City approval, the Certificate of Occupancy may be revoked.

Section 33H-25. Program Allocations.

(a) The program allocation, as used in this Article, is the percentage of the building cost which is set aside for the City's Art in Public Places Program and shall be an amount equal to

one percent (1%) of the total building valuation for an applicable project, excluding land acquisition and off-site improvement costs. The total building valuation shall be computed using the latest Building Valuation Data as set forth by the International Conference of Building Officials (ICBO) unless, in the opinion of the Building Official, a different valuation measure should be used.

(b) In lieu of placement of an approved art work, the applicant may pay to the City Art Fund an amount equal to the program allocation set forth in subdivision (a).

(c) Nothing in this section shall prohibit the applicant from placing an approved art work with acquisition and installation costs in an amount less than the program allocations; provided that the applicant shall also pay to the City Art Fund an amount equal to the difference between the program allocation and the costs of acquisition and installation of such art work.

Section 33H-26. Application Procedures for Placement of Art Work on Private Property.

An application for placement of art work on private property shall be submitted to the Planning Division and shall include:

(a) Preliminary sketches, photographs or other documentation of sufficient descriptive clarity to indicate the nature of the proposed art work;

(b) An appraisal or other evidence of the value of the proposed art work, including acquisition and installation costs;

(c) Preliminary plans containing such detailed information as may be required by the City Planner to adequately evaluate the location of the art work in relation to the proposed development, and its compatibility with the proposed development, including compatibility with the character of adjacent conforming developed parcels and existing neighborhood if necessary to evaluate the proposal; and

(d) A narrative statement to be submitted to the Culver City Arts Committee to demonstrate that the art work will be displayed in an area open and freely available to the general public at least ten hours each day, or otherwise provide public accessibility in an equivalent manner based on the characteristics of the art work or its placement on the site.

Section 33H-27. Approval for Placement of Art Work on Private Property.

(a) Except as provided in subsection (b), completed applications shall be submitted to the Culver City Arts Committee for review and approval of the art work, considering the aesthetic quality and harmony of the art work with the existing on-site improvements, and the proposed location of and public accessibility to the art work.

(b) If a development project is otherwise subject to Planning Commission review and approval and includes on-site placement of art work, the Culver City Arts Committee shall review the completed application and make a recommendation to the Planning Commission concerning the proposed art work and its proposed location, considering the aesthetic quality and harmony with the proposed project, and the

public accessibility to the art work, including any recommended conditions of approval. The following shall apply to the review and approval of such development project and art work:

(1) The Planning Commission shall consider the recommendations of the Culver City Arts Committee in its review and approval of the proposed project.

(2) If the applicant proposes or the Planning Commission recommends significant revisions to the architecture or physical design and layout of the proposed project subsequent to receipt of the Culver City Arts Committee recommendation, the revised application shall be returned to the Committee for further review and recommendation concerning the revised proposal prior to resubmittal to the Planning Commission for final review and approval.

(c) Any person may seek review of a Culver City Arts Committee decision made pursuant to subsection (a) by filing an appeal in accordance with Article XXA of Chapter 37 of this Code, commencing with Section 37-120A; provided that, for purposes of this section the reference herein to Planning Commission and Commissioners shall be deemed to mean Arts Committee and Committee members, respectively.

Section 33H-28. Application Procedure for Acceptance of Art Work Donated to the City.

An application for acceptance of art work to be donated to the City shall include:

(a) Preliminary sketches, photographs, models or other documentation of sufficient descriptive clarity to indicate the nature of the proposed art work;

(b) An appraisal or other evidence of the value of the proposed art work, including acquisition and installation costs;

(c) A written agreement executed by or on behalf of the artist who created the art work which expressly waives his or her rights under the California Art Preservation Act or other applicable law; and

(d) Other information as may be required by the Culver City Arts Committee to adequately evaluate the proposed donation of art work.

Section 33H-29. Review of Application for Acceptance of Art Work Donated to the City.

(a) Completed applications shall be submitted to the Culver City Arts Committee for review and recommendation to the City Council.

(b) Recommendations shall be forwarded to the City Council, which shall have the sole authority to accept or reject or conditionally accept the donation.

Section 33H-30. Acceptable Art Work to be Limited.

(a) For a period of five years from September 29, 1988, only applications for approval or donation of art work in the following shall be processed: sculpture; murals or portable paintings; earthworks; fiberworks; neon; glass

mosaics; photographs; prints; calligraphy; and other forms of physical hard media.

(b) At the end of the first five years of the Art in Public Places Program, the Culver City Arts Committee shall review the limitations set forth in subsection (a) and shall recommend any proposed revisions to the City Council.

Section 33H-31. Ownership of Art Work.

(a) All art work placed on the site of an applicant's project shall remain the property of the applicant; the obligation to provide all maintenance necessary to preserve the art work in good condition shall remain with the owner of the site.

(b) Maintenance of art work, as used in this Article, shall include without limitation, preservation of the art work in good condition to the satisfaction of the City, protection of the art work against physical defacement, mutilation or alteration, and securing and maintaining fire and extended coverage insurance and vandalism coverage in an amount to be determined by the City Attorney. Prior to placement of an approved art work, applicant and owner of the site shall execute and record a covenant in a form approved by the City for maintenance of the art work. Failure to maintain the art work as provided herein is hereby declared to be a public nuisance.

(c) In addition to all other remedies provided by law, in the event the owner fails to maintain the art work, upon reasonable notice, the City may perform all necessary repairs, maintenance or secure insurance, and the costs

therefor shall become a lien against the real property.

(d) All art work donated to the City shall become the property of the City upon acceptance by the City Council.

Section 33H-32. Art Work on Public Property.

(a) The Culver City Arts Committee shall prepare an annual plan for the Arts in Public Places Program.

(b) The Culver City Arts Committee may recommend to the City Council the purchase of art work to be displayed on public property. A recommendation shall include the type of art work considered, an analysis of the constraints applicable to placement of the art work on a site, the need for and practicality of the maintenance of the art work, and the costs of acquisition and installation of the art work.

Section 33H-33. Return of Fees.

(a) Fees paid into the City Art Fund which are not committed within five (5) years from the date of payment may be returned to the then current owner of the development project, with all interest actually earned thereon, if a written request for return is filed with the City Clerk during the fifth year after payment, and refund of the fees is approved by the City Council. The request for return shall be verified, and include the date of payment, the amount paid and method of payment, the location of the new development for which the fee was paid, and a statement that the applicant is the payor of the fees or the current owner of the development project.

(b) The City Council shall determine if return of the then uncommitted portion of the fees and interest is appropriate and, if so, the method of refund. No refund shall be appropriate if the City Council determines any one of the following applies:

(1) The City Council finds the fee is needed for the Art in Public Places Program.

(2) Moneys were not posted as fees, but were satisfied by letter of credit, bond or other instrument taken to secure payment at a future date.

(3) The administrative costs of refunding uncommitted fees pursuant to this Article exceeds the amount to be refunded; provided notice of a public hearing on this issue has been published and posted on the site of the development project in not less than three places.

SECTION 3. This Ordinance shall take effect thirty (30) days from the date of its adoption and prior to the expiration of fifteen (15) days from the adoption hereof the City Clerk shall cause this Ordinance to be published in the Culver City News.

APPROVED and ADOPTED this 29th day of August, 1988.

/s/ Paul A. Jacobs,
PAUL A. JACOBS, MAYOR
City of Culver City, California

ATTEST:

/s/ Pauline C. Dolce
PAULINE C. DOLCE,
City Clerk

APPROVED AS TO FORM:

/s/ Joseph W. Pannone
JOSEPH W. PANNONE
City Attorney

ORD/ART/PUBLIC/PLACES

Published in the Culver City News on September 3rd and 8th, 1988.

No. 93-842 (2)

In The

FILED
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OFFICE OF THE CLERK

SUPREME COURT of the UNITED STATES

October Term, 1993

RICHARD K. EHRLICH, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust,

Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIDES, PAUL A. JACOBS,

Respondents.

On Petition for Writ of Certiorari to the Court Of Appeal, State of California

---

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether a developer fee, which was imposed to mitigate the impact of granting a property owner's request for a land use change, was a constitutionally permissible monetary exaction related to a legitimate public purpose?

Whether a development condition, which requires the placement of art at a development site, or at the developer's option the payment of a fee in lieu of the art, violates the Taking Clause of the Fifth Amendment, the Freedom of Speech Clause of First Amendment or the Equal Protection Clause of the Fourteenth Amendment?

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No. 93-842

In The
SUPREME COURT of the UNITED STATES
October Term, 1993

RICHARD K. EHRLICH, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust,

Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIDES, PAUL A. JACOBS,

Respondents.

On Petition for Writ of Certiorari to the Court Of Appeal, State of California

BRIEF IN OPPOSITION

Respondents, City of Culver City, City Council of the City of Culver City, Steven Gourley, Jozelle Smith, James Boulgarides, Paul A. Jacobs, (hereinafter the "City")

respectfully request this Court deny the Petition of Richard K. Ehrlich, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust (hereinafter "Petitioner") for a writ of certiorari seeking review of the opinion of the California Court of Appeal, Second Appellate District, Division Five.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1[1], the City presents the following statement of the case to address petitioner's omissions and to supplement the statement of the case presented by petitioner.[2] Petitioner has omitted the statutory scheme the California Legislature has prescribed to meet this Court's requirements under Nollan v. California Coastal Comm'n., 483 U.S. 825 (1987). Petitioner never made any attempt to seek the City's permission to modify the Specific Plan which was applicable to the subject property. Finally, Petitioner failed to note the City was able to approve Petitioner's requested residential land-use approvals only because it

---

[1] Respondents' Brief in Opposition is timely pursuant to Supreme Court Rule 15.2. Respondents received the petition on November 29, 1993.

[2] Petitioner goes to great lengths to persuade this Court with numerous inappropriate citations to the voided opinion of the Court of Appeal in this matter. Pursuant to California Rules of Court (CRC 976) and Miller & Lux, Inc. v. James, 180 Cal.38 49 (1919), when a court of appeal grants a request for rehearing of an opinion, that opinion is vacated and has no effect.

also approved an amendment to the City's General Plan.

A. California's Statutory Scheme to Implement the *Nollan* Nexus Requirement

In 1987, in response to the concerns expressed in this Court's decision in Nollan, supra, the California Legislature adopted statutory restrictions on development fees imposed by government agencies. This legislation (known as and referred to hereinafter as the "developer fee statute") was intended to protect landowners from being singled out to bear public burdens and to insure all local California governments complied with Nollan's requirements that land use regulations substantially further a legitimate state interest.[3] The developer fee statute allows local governments to impose development fees only where they have made certain findings and have complied with specific procedures. In the State proceedings, petitioner alleged the City violated the developer fee statute when it imposed the subject mitigation fee. The Court of Appeal found the City complied with the developer fee statute. App. 23 and 24. Because of the applicability of this statutory scheme, it is

---

[3] The developer fee statute is codified at Sections 66000 et seq. of the California Government Code. The pertinent section, which establishes the nexus requirement, is set forth in Cal. Government Code Section 66001 (reprinted in its entirety in Court of Appeal Opinion at App. 21-23 [fn. 2] of petitioner's Petition for Writ of Certiorari). Hereinafter, references to the petition shall be noted as Pet. at __; references to any appendix of the petition shall be noted as App. __.

important to an understanding of this case that an explanation of the developer fee statute be included.

The developer fee statute forbids imposition of any development fee unless the local government has demonstrated a cause and effect relationship between the project subject to the fee and the problem to be addressed. The local agency must make specific findings that there is a reasonable relationship between: (1) the fee's use and the type of development project on which the fee is imposed [Cal. Government Code § 66001(a)(3)]; (2) the need for the public facility [financed by the fee] and the type of development project on which the fee is imposed [Cal. Government Code § 66001(a)(4)]; and (3) the amount of the fee and the cost . . . of the portion of the public facility attributable to the development on which the fee is imposed. [Cal. Government Code § 66001(b)]. The City's compliance with these requirements is not before the Court. The Court of Appeal determined the City met this statutory scheme:

> Here, the City found that the mitigation fee would be used to pay for replacement of community recreational facilities which had been provided by the land-use restrictions on the property, the opportunity for which recreational facilities would be lost by approval of the project. The City found that the recreational facilities which had been on the property included tennis courts, paddle tennis courts, swimming pool, running track, aerobics area, jacuzzi, and sauna. The City found that the value of the recreational facilities which had been on the property was $800,000, the value of the project was $10 million, and the replacement cost of just four tennis courts would be approximately $280,000.

> The $280,000 was earmarked specifically to replace community recreation facilities. These findings are adequate and reasonable (Footnote omitted).

App. 23 and 24.

In addition, to the above requirements, local governments in California must identify the specific purpose of the fee and the use to which the fee will be put. Cal. Government Code Section 66001(a)(1) and (2). To ensure that fees are not diverted to the local government general fund, the developer fee statute further requires that all fees and interest thereon be maintained in a separate fund or account. Cal. Government Code § 66001(c). If a development fee is not expended or committed within five years, the local government must make further findings each year thereafter to demonstrate a continuing reasonable relationship between the anticipated use of the fee and the purpose for which it was imposed. Cal. Government Code § 66001(d). If this finding cannot be made, the local government is required to refund the fee. Cal. Government Code § 66001(e).[4]

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[4] Petitioner challenged the City's compliance with other provisions of the Government Code requiring that fees and exactions "not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed" [Cal. Government Code § 66005(a)] and that any fee or exaction which does exceed the reasonable cost, must be treated as a special tax subject to the provisions of California's "Proposition 13" (Art. XIIIA, § 4 of the California Constitution) and California Government Code §§ 50075 and 50076. The Court of Appeal determined the City had also complied with these requirements. App. 16-20 and 24.

B. Lack of Ripeness.

An economic feasibility study prepared by the City found inconsistency of management and problems of upkeep were contributing factors to the financial problems of the facilities which existed on the site, pursuant to the Specific Plan. App. 7. This same study also showed a modified recreational facility could be a viable use for the property. App. 7, 8, 12 and 13. Even petitioner admits a community recreational facility could be economically operated on subject property. Pet. at 6. Notwithstanding this, petitioner never requested the City to grant a modification to the Specific Plan to permit redevelopment of the property for a new, reconfigured community recreational facility use.

On April 10, 1989, Petitioner's initial application for the residential development was denied on the grounds that the existing land use restrictions on the property were needed by the community. App. 4. The City's Human Services Director submitted a report which showed the property had a history of community recreational use and the loss of the opportunity for the continuance of such facilities, which would result from a land use change, would negatively impact the community. App. 8. The above evidence clearly supports the City's determination that the recreational facilities land use restrictions on the subject site would meet the community needs, the public interest and provide an economically viable project for the site.

Notwithstanding this, Petitioner never requested permission to redevelop the site to provide such facilities. In fact, from 1974 through 1988 the petitioner, on only two occasions, requested permission to develop the property other than as required by the Specific Plan. In 1981,

petitioner requested permission to construct an office building. This request was presented to the Planning Commission. The Planning Commission recommended denial, and the petitioner never pursued it through City Council hearings. Then, in September of 1988, petitioner applied for the residential use (30 deluxe townhomes) which upon reconsideration the City granted. Pet. at 4-7.

C. The City Was Not Required to Approve the Townhome Project.

One of the land use approvals requested by petitioner in September, 1988 was a General Plan amendment. App. 7. The General Plan land use designation for the subject property, prior to the City's actions to approve the townhome project, was commercial. In order to approve the condominium project, the City also had to approve a tentative and final tract map pursuant to the California Subdivision Map Act. App. 7; Cal. Government Code §§ 66410, et seq., specifically Section 66426. Pursuant to the Subdivision Map Act, the City could not approve the condominium project unless it could make a finding the condominium project was consistent with the City's General Plan. Cal. Government Code § 66474. In order to make such a finding, the City had to redesignate the petitioner's property from the General Plan land use designation of commercial to residential.

REASONS FOR DENYING THE WRIT.

THIS CASE PRESENTS NO ISSUES MERITING SUPREME COURT REVIEW

A. Mitigation Fee.

1. The Mitigation Fee Does Not Conflict With Any of This Court's Rulings Regarding Regulatory Takings

Petitioner relies on Supreme Court Rule 10.1(c) to support its request for a Writ of Certiorari. Petitioner contends the Court of Appeal opinion conflicts with this Court's decision in Nollan, supra. Pet. at i and 13. Petitioner's assertion is totally without merit.

The Court of Appeal opinion makes it clear the Nollan two-prong test was appropriately applied. App. 11. The Court of Appeal first reviewed whether the City could have denied the application for the 30 deluxe townhomes. After determining the City could, the Court of Appeal then reviewed the facts of the case to determine whether the mitigation fee, which was imposed as a condition of approving changes to the land use designations in order to permit the 30 deluxe townhomes, substantially furthered the goal which would have been reached by the denial.

Petitioner also attempts to overturn the Court of Appeal decision because of its reliance on Blue Jeans Equities West v. City and County of San Francisco, 3 Cal.App.4th 164 (1992), and Commercial Builders v. Sacramento, 941 F.2d 872 (9th Cir. 1991). This Court denied petitions for writs of certiorari in both cases. __ U.S. ___, 113 Sup.Ct. 191 (October 1992) and ___ U.S. ___, 112 Sup.Ct. 1997 (May 1992), respectively. Both Blue

Jeans Equities West and Commercial Builders held that developer fees should be reviewed under a different standard of review (the rational relation test) than are physical exactions, such as an easement (the substantially advance test). Even though case precedent would permit the use of the more relaxed rule in this case, the Court of Appeal applied both the "rational relation" test and the "substantially advanced/heightened scrutiny" test of Nollan. After doing so, the Court of Appeal found the mitigation fee met both tests. "There was a substantial nexus between the land-use restriction and the condition of approval." App. 14.

The first question to be addressed, pursuant to Nollan, is whether the City could have denied petitioner's request to build 30 deluxe townhomes. Petitioner tries to cloud this first inquiry by stating the City could not have forced petitioner to stay in the recreational facility business or replace its demolished facilities. The City agrees and has never said otherwise. The City could not force petitioner, or any other person, to operate any business on the subject site or anywhere else. The Court of Appeal opinion echoes this conclusion. Pet. at 15. However, such restriction does not negate the City's authority to plan its community for various uses, including recreational facilities, which the legislative body determines are necessary for the public health and welfare. This is a fundamental authority every City has under its police power. Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926); Keystone Coal Association v. DeBenedictis, 480 U.S. 470 (1987). Based on the foregoing long recognized authority, the City can regulate the use of land within its jurisdiction in such a way as to provide the community with the opportunity to have housing in certain areas, commercial and industrial uses in other areas and

recreational facilities constructed and properly operated, managed and maintained on the subject site.

This is true even if, as in this case, the property owner no longer wanted to provide the use required by the City's land use approvals. This authority is no different from the City's power to require certain properties to be designated solely for rental housing for low- and moderate-income residents, television and movie studios, stadiums, or a regional shopping mall. A property owner's options would be (i) to leave the land fallow and exclude all others from it, (ii)to use the property as authorized or for a similar use subject to the approval of any necessary modification or (iii) to sell the property to another to be used as authorized or with modifications, but for the same use. Petitioner had the exact same options. App. 16.

Petitioner states that if the land use scheme described above is permitted to stand then cities will "over regulate" (Pet. at 24) or require payments for removal of parochial schools and grocery stores (Pet. at 21). This contention is no more than unfettered and unsupported hyperbole.

With regard to the theoretical parochial school issue, the Establishment Clause of the First Amendment would prohibit a city from regulating property in such a way as to require such a use to be placed on the property. Likewise, the Establishment Clause would prohibit a city from requiring the payment of a fee which would be spent to support such a use. Therefore, a city could not require payment of a fee which would be used to replace a removed school.

With regard to the grocery store example, any city would be hard pressed to show loss of one grocery store

could cause a significant impact on the community. When so many other similar establishments would likely be readily available, it would be virtually impossible to require some special mitigation. In addition, the City is unaware of any authority it could rely upon which would permit it to operate a commercial grocery store.

Unlike parochial schools and grocery stores, recreational facilities have been recognized to serve legitimate public interests and benefits, which can be served through development conditions. Associated Home Builders of the Greater East Bay, Inc. v. Walnut Creek, 4 Cal.3d 633 (1971) [cert. denied 404 U.S. 878 (October 19, 1971)]. Based on all the foregoing, the City would have been well within its municipal police power if it had denied the request to change the land use designation.

Fundamental to petitioner's argument that the City could not meet the first prong of the Nollan test is the incorrect assumption the City was obligated to approve the 30 deluxe townhome project. This assumption runs afoul of every city's long recognized police power and legislative discretion. The fact that a property owner chooses not to use property according to its land use designation does not mean a city must redesignate the property as that property owner desires. Penn. Central Transportation Co. v. New York City, 438 U.S. 104, 125-138 (1978). This is especially true if the existing land use designation, or some modification thereto which provides for a similar type of use, enables the property owner to have an economically viable use for the property.[5]

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[5] Petitioner should not be allowed to argue it could not continue to provide recreational facilities on the site because the Specific Plan was too restrictive. Pet. at 16 and

It is also important to note, even assuming arguendo the recreational facility use for the site was not economically viable, petitioner's interest in the subject property was obtained after the recreational community facility designation was placed on the property. App. 73. This fact is important because this Court has said even a regulation which deprives land of all economically beneficial use does not affect a compensable taking if "the prescribed use interests were not part of [the property owner's] title to being with." Lucas v. South Carolina Coastal Council, 505 U.S. ____, 112 Sup.Ct. 2886, 2899 (1992). In addition, as noted by the Court of Appeal (App. 13), petitioner purchased the subject property with the knowledge of the recreational use restrictions and with the intent to develop the property as a recreational facility. Pet. at 4 and 5. The relevance of petitioner's intentions regarding the property was recognized by this Court.

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17. The record is void of any evidence or inference that petitioner ever requested the City to modify the Specific Plan to provide a different configuration for community recreational facilities. Had the petitioner done that, been denied such a request, and then requested the City to put some other use on the property which was also denied, such facts could very well have left the petitioner with no economically viable use of the property. However, such a situation is not present in this case. Petitioner never pursued an application through the full legislative and administrative process for any use other than the deluxe townhome project. Therefore, petitioner's argument in this regard is not ripe for adjudication. Williamson County Regional Planning v. Hamilton Bank of Johnson City, 473 U.S.172 (1985); MacDonald Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

> Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." [Citation omitted.] "In engaging in these essentially ad hoc, factual inquires, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.

Penn Central Transportation Co., supra, 438 U.S. at 124.

Based on all the foregoing, the City and the Court of Appeal have established the first prong of Nollan has been met. The City could have denied petitioner's request for a land use change.

The facts just as clearly show the second prong of the Nollan test has also been met. The sole purpose of the mitigation fee is to provide the City with dollars which were specifically restricted for use by the City to provide an opportunity to have recreational facilities within its jurisdiction. The opportunity provided by the mitigation fee is similar to the opportunity the City would have had it if had denied the requested changes to the land use designation. If the recreational facility land use designation had remained, the City would have continued to have the opportunity of realizing construction and operation of much needed recreational facilities for the

community. The mitigation fee, in a small way,[6] continued to provide the community with such an opportunity.

2. The Mitigation Fee Did Not Violate Petitioner's Equal Protection Rights

Petitioner claims, only with the support of a footnote from Nollan, the mitigation fee violates the Equal Protection Clause. Pet. at 26. The Court of Appeal gave such an argument the short shrift it deserved. That court concluded the fee was reasonably related to the loss of the opportunity for recreational facilities on the subject site, and, therefore, no equal protection violation occurred. App. 20.

The question presented by the footnote quoted by petitioner is whether the burden being suffered is a public burden which should not be borne by one property owner. The burden is definitely a public burden, the loss of the opportunity for needed community recreational facilities. However, the burden is created by petitioner's request for a zone change.

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[6] The record contains evidence showing the cost of the improvements that had been provided on the site for many years were worth at least $800,000. The record also shows that to replace the tennis courts would cost somewhere between $275,000 to $300,000, to replace the paddle tennis courts would cost between $135,00 or $150,000, and to replace the pool would cost between $250,000 and $280,000. App. 3, 8, 9 and 16. Based on these facts and the additional evidence that the townhome project was valued at $10 million, the Court of Appeal correctly found that the $280,000 mitigation fee was not excessive or arbitrary. App. 16.

As previously shown, the City could have refused the zone change. In doing this, petitioner would not have suffered any unconstitutional taking and yet the community would have retained the opportunity for community recreational facilities. Instead of "exacting" this from the petitioner, the City found a compromise. It granted petitioner the requested zone change, which permitted a $10,000,000 townhome project to be built. In exchange, it protected the public welfare by conditioning the approval on the payment of the mitigation fee. This accommodation did not burden petitioner disproportionally when compared to the burdens caused by the requested zone change.

This exaction was certainly different from any other exaction on any other property owner. However, petitioner's request was likewise unique and many, if not most, of the benefits which resulted from granting the request accrued to petitioner alone and not to the public. Because the mitigation fee did not create an unfair burden on petitioner, the City did not violate the Equal Protection Clause

3. Various Other Cases Cited By Petitioner Are Inapplicable

Briefly discussed next are petitioner's references to other decisions from this Court. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) is a case which dealt with a physical taking of property. In Loretto, New York required landlords to permit cable television companies to lay wire on their buildings. The inapplicability of Loretto to this case is made clear by this Court's decision in Yee v. Escondido, 503 U.S. ___, 112 Sup.Ct. 522 (1992), which petitioner also cites to support its claims.

In Yee, this Court found California's mobile home residency law did not create a physical taking. "The government affects a physical taking only when it requires the land owner to submit to a physical occupation of his land. [Emphasis original.]" Yee, supra, 503 U.S. at __, 118 L.Ed. 2d at 165. "On their face, the state and local laws of issue here merely regulate petitioners' use of their land by regulating the relationship between landlord and tenant. [Emphasis original.]" Ibid. at __, 118 L.Ed.2d at 166. The recreational facility land use restriction in question here also only regulated how the land would be used. It did not require petitioner to use the land. It did not permit the City or anyone else to enter onto the land. Nor did it require petitioner to open and operate any business. What it did do was mandate how the petitioner could use its land, if and when the petitioner chose to develop it. Pursuant to Yee, supra, this was a legitimate exercise of the City's police power.

Petitioner cites to Ruckelshaus v. Monsanto Company, 467 U.S. 986 (1984) and Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). In Ruckelshaus, this Court determined the Environmental Protection Agency could not transform private trade secrets into public property by requiring such trade secrets to be disclosed on reporting forms. In Webb's Fabulous Pharmacies, Inc., this Court determined money deposited in court in order for the depositor to avail itself of statutory protections for clearance from creditors also could not be transformed into public funds. Such attempts at transformation of private property into public property is not a factor in this case. At all times while the recreational use restrictions applied to the property, it remained private. At any time during that period, petitioner could have conveyed its property to another. In fact, while the recreational facility land use

restrictions applied to the site that is exactly what happened on two occasions. First, ownership was conveyed to Richard K. Ehrlich. Then, at some later date, two family trusts were given title. Therefore, one of the fundamental incidents of ownership, the right of alienation, was always retained by the owner, including the petitioner.

Petitioner again misses the mark (Pet. at 25) when it asserts the City had no rights in the private improvements that had been placed on petitioner's property. The City wholeheartedly agrees with this position and recognizes Kaiser-Aetna v. United States, 444 U.S. 164 (1979) stands for this proposition. The reason the above noted case is irrelevant here is the City never asserted such rights. In fact, the City issued a demolition permit which allowed petitioner to raze all improvements on the subject site. Pet. at 7. The City's contention is simple and as stated by the Court of Appeal opinion. "The City could however require that the [petitioner] use [its] property if at all for a recreational purpose." App. 16.[7]

Finally, petitioner's reliance on FCC v. Florida Power Corp., 480 U.S. 245 (1987) is at best confusing. This case permitted the FCC to regulate the rates utilities may charge cable television companies for the use of utility poles. This Court specifically held that such a regulation does not constitute a "per se" taking. In its discussion, this Court again emphasized one of the important rights which

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[7] In citing to Justice Rehnquist's sole dissent in Fresh Pond Shopping Center, Inc. v. Acheson Callahan, 464 U.S. 825 (1983), petitioner goes beyond the bounds of reason. This "case" is a memorandum decision dismissing an appeal of a Massachusetts State Supreme Court decision for want of a substantial federal question.

attach to property ownership. That is, the right to exclude others. Nothing the City did, either in adopting the original recreational land use controls or in assessing the mitigation fee, in any way infringed on petitioner's rights to prevent others from entering its property.

Based upon all the foregoing, neither the City nor the Court of Appeal deviated from the requirements established by this Court in Nollan nor from any other relevant decisions of this Court. The City could have denied the requested land use application for 30 deluxe townhomes, but instead granted petitioner's requested land use approvals. The City mitigated the impacts from such approvals by requiring a condition (the payment of the $280,00 mitigation fee) which would assist in the partial elimination of the lost opportunity to have needed community recreational facilities built on the site. As noted by the Court of Appeal, under either the "rational relation" test or the stricter "substantially advances" test, the City's burden has been met.

B. The Art and Public Places Program

1. The City's Art in Public Places Program Is a Valid Development Condition.

As with the mitigation fee, petitioner asserts[8] the development condition requiring placement of art on a project site violates precedents established by this Court. First, petitioner aileges Nollan is applicable to this condition. Petitioner's assertion is misplaced.

The City's Art in Public Places Program is not an exaction as addressed by Nollan. Instead, as noted by the Court of Appeal and, for that matter the trial court, the art requirement was no different than the City's requirements for setbacks, open space, landscaping and other typical development conditions related to aesthetics. App. 26 and 27.

The art program falls well within the City's police powers as enunciated by Agins v. City of Tiburon, 447 U.S. 255 (1980) and Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). In Agins, this Court determined a City's police power extended to placing conditions which require scenic view restrictions. In Penn Central Transportation Co., the Court concluded a legitimate exercise of the police power was the adoption of regulations which preserved landmark structures.

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[8] It is interesting to note, during oral argument in the Court of Appeal, counsel for petitioner stated petitioner would not have challenged or appealed the art condition, if the mitigation fee had not been levied.

If this Court embraces petitioner's bold assertions that the Art in Public Places Program must and cannot meet the Nollan two-prong test, the City likewise could not require landscaping, architectural amenities or other aesthetic related requirements as conditions of development. Under Nollan, unless the City could deny a requested permit because of its impact on landscaping, architecture or aesthetics in the City, it could not attach landscaping, and other design criteria as conditions of approval for a development. Such an absurd result is obviously not what this Court had in mind when it decided Nollan. In fact, such a conclusion would be contrary to this Court's direction relating to a city's authority regarding aesthetics. This Court has stated time and again community aesthetics are concerns to which a city's police power extends. City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (prohibition against posting signs in the public right of way); Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (prohibition against certain forms of outdoor billboards); Berman v. Parker, 348 U.S. 26 (1954) (requirements to remove blighted housing). It was also noted by the Court of Appeal, the Art in Public Places Program is not dissimilar to parkland dedication requirements, which have been upheld. Associated Home Builders of the Greater East Bay, Inc. v. Walnut Creek, 4 Cal.3d 633 (1971) [cert. denied 404 U.S. 878 (October 19, 1971)]. App. 27. Based upon the foregoing, the City's Art in Public Places Program does not constitute an exaction subject to review under Nollan standards.

2. The Art in Public Places Program Does Not Violate the Equal Protection Clause.

Petitioner states, without support, the Art in Public Places Program violates its equal protection rights. The

only new argument raised is that such a program is not the same as other aesthetic requirements because there is no health and safety issue. As stated earlier, this Court has consistently found cities have authority to legislate in the area of aesthetics. Since the City can require the planting of trees on a development site, it can likewise require the installation of art in an effort to add to the aesthetics of a community.

The use of a City's police power to protect its residents from the ill effects of urbanization has long been recognized as legitimate. Agins v. City of Tiburon, supra, 447 U.S. at 261. This Court has described the scope of the police power.

> An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the Legislature has spoken, the public interest has been declared in terms well-neigh conclusive. In such cases the Legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.

Berman v. Parker, supra, at 32-33 (1954). The City has exercised such power for the well-being and benefit of those working and living within the jurisdictional boundaries of the City through the adoption of its Art in Public Places Program.

The Court of Appeal noted the City's findings contained in the ordinance adopting the art program.

Such findings make it clear the City's interest in the program was to promote the general welfare. App. 24 and 25; Culver City Municipal Code Section 33H-20 (App. 80 and 81).

Programs which promote the public benefit, even when the program shifts the burdens of economic life, do not readily rise to such a level of infringement as to become a "taking". "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, [citation omitted] than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Central Transportation Co., supra, 438 U.S. at 124.

Even in Nollan, supra, 483 U.S. at 835, Justice Scalia, writing for the majority, reaffirmed there is a wide range of legitimate government interest which can be accomplished through land use regulations. To these interests, the Court of Appeal has correctly added the development of cultural and artistic resources. The Art in Public Places Program is simply a mechanism to provide increased numbers of displayed artworks. Within the scope of the City's constitutionally based police powers, there is sufficient flexibility to design programs to promote the public good, even as the public interest has evolved.

> Until recent years, urban life was comparatively simple; but with a great increase and concentration of population, problems have developed, and constantly are developing which require, and will continue to require, additional restrictions and respect of the use of private lands in urban communities. Regulations, the

> wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, probably would have been rejected as arbitrary and oppressive.

Village of Euclid v. Ambler Realty Company, supra, 272 U.S. at 387.

Based on all the forgoing, there is no difference among requiring a developer to place trees, other landscaping and aesthetic amenities on a site, to adhere to building heights and setback restrictions in designing a structure and to purchase an artwork of the developer's choice for placement on its property. None of these aesthetic requirements violates anyone's equal protection rights.

3. The City's Art in Public Places Program Does Not Violate the Freedom of Speech Rights Established by the First Amendment.

Petitioner argues the City's Art in Public Places Program violates the First Amendment right to free speech because it requires the developer to express a viewpoint or opinion. However, the program is not dissimilar from nor any more burdensome than architectural review which many communities require before building permits are issued. The Art in Public Places Program is nothing more than an attempt to enhance the aesthetics of the community in much the same way architectural review does. If the City is without authority to effectuate the Art in Public Places Program, how could it continue to effectuate architectural review? If such an aesthetic requirement is deemed to be unconstitutional, could not a potential developer argue that First Amendment rights are being violated by a city which requires Romanesque, art

deco or early California mission-style architectural designs?

The Art in Public Places Program does not control content. In the case of a developer who elects to comply with the art program by placing a piece of art on the developer's property, the program does not mandate that the developer install a City chosen piece of artwork or otherwise mandate any particular content for the artwork. The only issues to be determined by the City are the art work's "aesthetic quality and harmony with the proposed project, and the public accessibility to the artwork". Culver City Municipal Code § 33H-27(b); App. 85-86. As stated previously, these concerns are no more burdensome or excessive than architectural review for buildings, prior to the issuance of a building permit.

Petitioner argues the Art in Public Places Program requires petitioner to express other people's ideas. Petitioner asserts it has to commission a third party to produce the artwork. Pet. at 29. Such an assertion is absurd on its face. The art program does not require petitioner to divest itself of its interest in producing artwork of which it approves. As long as such artwork and its proposed location meets the aesthetic quality and harmony of the proposed project, petitioner can commission whatever type of art it desires.

Three cases cited by petitioner in support of its First Amendment claims, deal with governmental actions which, in essence, required individuals to contribute money to organizations which then used the money to express particular ideological points of view. The Art in Public Places Program requires no such contribution.

The art program simply requires a property owner who desires to construct a development on a site within the City, to aesthetically enhance the project and the community by placing a piece of art, of the developer's choice, on the site. Under California law, there is no vested right to obtain a zone change or building permit. The granting of both is a privilege which can be granted subject to reasonable conditions. Avco Community Developments, Inc. v. South Coast Regional Comm'n., 17 Cal.3d 785, 791 (1976) [no vested interest found even though a permit had been issued in conformance with all zoning regulations because the property owner had not performed substantial work and incurred substantial liability in good faith reliance on that permit].

Under the City's art program, a property owner has no obligation to install any art, until development is proposed. If an owner chooses to develop, the City's program requires a work of art to be incorporated into the project as a condition of granting the permission to build.[9] This development condition enhances both the project site and the community.

Petitioner also relies heavily on the Court's decision in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (mandatory flag salute) to support its contention that the Art in Public Places Program violates its First Amendment rights to free speech. The opinion in West Virginia State Board of Education was a plurality

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[9] The value of the art work must be 1% of the value of the building costs which exceed $500,000 for new development and $250,000 for remodels. Typical landscaping costs for a development account for 10-20% of a total project's cost. App. 30.

decision of three justices. The three concurring justices, one of whom is Justice Murphy (whose opinion is cited by petitioner) focused their decision on the freedom of religion, not the freedom of speech. A few lines after the language quoted by petitioner (Pet. at 29) Justice Murphy states "official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the 'severest contest in which I have ever been engaged.' [Footnote omitted.]" West Virginia State Board of Education, supra, at 646. Justices Black and Douglas state in their concurring opinion: "Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and in meeting it we cannot say their failure because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation. Such a statutory exaction is a form of test oath, and the test oath has always been abhorrent in the United States." West Virginia State Board of Education, supra, at 644.

If the City's Art in Public Places Program required some particular form of religious art (a cross, a six-point star, a star and crescent), then petitioner would be correct in asserting the City had gone beyond the bounds of constitutionally exercising its police power. These are not the facts applicable to this case. All the Art in Public Places Program establishes is a requirement for some aesthetic improvement to be included as part of a development, the nature and content of which can be chosen by the property owner (subject only to City review to ensure the aesthetics of the artwork fits in with the

aesthetics of the architectural design of the development itself).

In any event, petitioner has failed to provide this Court with any clear indication how the Court of Appeal's opinion conflicts with any established decisions of this Court. Therefore, this Court is respectfully requested to deny petitioner's request for review of the Court of Appeal's decision regarding the Art in Public Places Program.

For both the mitigation fee and the Art in Public Places Program, far from demonstrating a conflict between the Court of Appeal opinion and any of this Court's decisions, petitioner instead has revealed a consistent application of Nollan, the Takings Clause, the Equal Protection Clause, and the Free Speech Clause. As to the mitigation fee, the Court of Appeal has established a substantial connection between the fee and petitioner's application for land use changes. The facts of this case, the Court of Appeal decision and California's statutory scheme to implement Nollan illustrate a scrutiny demanded by Nollan and promote clear legislative fact finding. As to the Art in Public Places Program, the Court of Appeal has correctly analogized this development condition to other aesthetics related development conditions.

CONCLUSION
CONCLUSION

For the reasons stated herein, the Court should deny the petitioner's Petition for Writ of Certiorari.

Respectfully submitted,
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No. 93-842

In the
Supreme Court of the United States
October Term, 1993

RICHARD K. EHRLICH, as trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965, Trust,
Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIDES, AND PAUL A. JACOBS,
Respondents.

Petition for Writ of Certiorari to the Court of Appeal, State of California

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, RICHARD K. EHRLICH

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, RICHARD K. EHRLICH

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully move this Court for leave to file the attached amicus curiae brief in support of petitioner, Richard K. Ehrlich. Consent to the filing of this brief has been granted by counsel for petitioner, and has been lodged with the Clerk of this Court. Respondent, City of Culver City, *et al.*, has withheld consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the nation and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992). PLF joined with Richard K. Ehrlich (the petitioner in this case) in an amicus brief in support of Florence Dolan's petition for certiorari in *Dolan v. Tigard City*, Supreme Court No. 93-518, which this Court granted on November 29, 1993.

PLF has also participated in numerous cases involving the forced payment of money or dues which are used for political or other purposes in derogation of the payers' First Amendment Rights. For example, PLF attorneys represented aggrieved members of the State Bar of California in *Keller v. State Bar of California*, 649 U.S. 1 (1990).

Amicus seeks here to augment the argument in the petition for writ of certiorari. PLF's public policy perspective and litigation

experience in support of private property and First Amendment rights will provide an additional viewpoint with respect to the constitutional issues presented.

This case involves another egregious violation of federal constitutional rights in the guise of local land use permitting regulations. In exchange for permission to build condominiums on the site of a defunct health club, the City of Culver City is requiring the property's owner, Richard Ehrlich, to pay a $280,000 fee to "mitigate" the loss of private tennis courts that used to be on the property before they were lawfully demolished in 1989.

This condition is an egregious violation of this Court's decision in *Nollan v. California Coastal Commission* wherein this Court held that permit conditions must bear an essential nexus to a harm which would be created by the project itself, where such harm could justify the denial of the permit in the first place.

In exchange for a permit to construct condominiums on the site of a once money-losing and now demolished health club, the City of Culver City is also forcing Ehrlich to pay for or construct himself $33,220 worth of public art--*which must be approved in advance by the city council*! Forcing Ehrlich to pay for or to put up public art (approved by the City Council) violates Ehrlich's First Amendment right of free expression. The city's requirement or Ehrlich to finance city council approved art impinges upon Ehrlich's First Amendment rights and as such is in direct conflict with *Keller v. State Bar of California* and *Virginia State Board of Education v. Barnette*, 319 U.S. 624, 634 (1943) (rejecting view, in mandatory flag salute case, that we have "a Bill of Rights which guards the individual's right to speak his own mind, [but] left it open to public authorities to compel him to utter what is not in his mind").

If the decision below stands, it will represent a serious setback to the First Amendment right of free expression and the Fifth Amendment guarantee against the taking of private property without just compensation. This result would abridge fundamental

notions of fairness and equity by unconsciously tipping the constitutional balance in favor of the state's regulatory power over the rights of the individual.

For the above reasons, Pacific Legal Foundation requests that its motion to file the amicus curiae brief which follows be granted.

DATED: December ___, 1993.

Respectfully submitted,

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No. 93-842

In the

Supreme Court of the United States

October Term, 1993

RICHARD K. EHRLICH, as trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965, Trust,
Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIDES, AND PAUL A. JACOBS,
Respondents.

Petition for Writ of Certiorari to the Court of Appeal, State of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, RICHARD K. EHRLICH

INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceding motion and are adopted herein.

OPINION BELOW

The opinion of the California Court of Appeal is reported at *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737 (1993).[1]

STATEMENT OF THE CASE

Richard Ehrlich once owned a money-losing, private health and tennis club in Culver City. In 1974 Ehrlich applied for and received approval of a site plan to build the club. Unfortunately, it was a money loser. After trying for 14 years to make it work, Ehrlich decided to replace the club with housing. The club was closed in 1988 and in 1989 was lawfully demolished after Ehrlich donated the club's equipment to Culver City. In exchange for a building permit, however, Culver City is now forcing Ehrlich to pay a fee of $280,000 so that the city can build its own public tennis courts--allegedly to make up for the loss of public recreational opportunities represented by the demolished private facilities.

On November 29, 1993, this Court granted certiorari in *Dolan v. City of Tigard*, No. 93-518. Pacific Legal Foundation represented itself and Richard K. Ehrlich as amici in support of the petition for certiorari in *Dolan*. Lower courts have devised a formula for abuse and obfuscation of this Court's formulation of the law of takings and conditions as it was described in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). *Dolan* represents one-half of the formula. This case represents the other half.

Dolan raises once again the question of whether a condition or exaction of ***land*** in exchange for a building permit can be harmonized with the Fifth Amendment's Takings Clause--especially when the exaction bears no discernible relationship to an impact created by the building project. Richard Ehrlich's case

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[1] For the court's convenience, references to the decision below shall be to the reported decision and the decision as reproduced in petitioner's appendix.

represents the second half of the equation: whether an exaction of ***money or fees*** imposed in exchange for a building permit can be harmonized with the Fifth Amendment's Takings Clause--especially when the exaction bears no discernible relationship to an impact created by the building project. Some local and state governments, such as the City of Culver City and some courts, recognize the existence of the *Nollan* decision but have attempted to avoid it, purportedly by distinguishing *Nollan* to its facts, claiming alternatively that *Nollan* applies only to "possessory takings" or only to permit exactions of interests in real estate rather than cash.

The city is also requiring Ehrlich to pay a $30,000 public park facilities fee (which is not the subject of this litigation) and a $33,220 in lieu of public arts fee. This latter fee may only be waived if Ehrlich chooses to erect the art himself--*so long as the city council approves the art in advance*. This fee is a violation of Ehrlich's First Amendment right of free speech--or right not to speak. As important as the Fifth Amendment takings issues are to this case, the First Amendment issues provide an equally compelling rationale for review by this Court.

Ehrlich, therefore, is left with a few very unpalatable choices. Ehrlich could leave the land vacant and receive no economically beneficial or productive use whatsoever from the land. Ehrlich could rebuild the defunct, money-losing health club and presumably avoid paying any fees (although the city's rationale for the public arts fee would remain)--which would force Ehrlich to forego economically *viable* use of his land *and* suffer occupation by members of the public. Ehrlich could sell the land to the proverbial "investor-sucker" who would have the opportunity to rebuild the defunct, money-losing health club. Finally, Ehrlich could build the condominiums and pay the extortionate fees to the city. These choices all force Ehrlich to submit to unacceptable and unconstitutional regulatory strictures. As this Court noted in a different context, "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all." *New York v. United States*, 505 U.S. ___, 120 L. Ed. 2d 120, 150 (1992).

REASONS FOR GRANTING THE WRIT

I

SUMMARY OF ARGUMENT

The legal reasoning employed by the appellate court and the *result* conflicts with controlling federal precedents thus creating a conflict between California and federal interpretations of the United States Constitution.

The inherent vice with the Court of Appeal's decision is its facile conclusion that permit conditions requiring exactions are acceptable if they merely meet the general test for regulatory takings set out in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (regulations must (1) substantially advance a legitimate governmental interest and (2) leave a property owner with economically viable use). In reaching this conclusion the court avoided consideration of the more specific test in *Nollan* for permit conditions. In short, there was no genuine showing that the exaction was designed to mitigate any public burden created by the project itself.

The erroneous direction taken by the court below was further compounded by its conclusion that monetary exactions are different from other exactions and its consequent refusal to apply the heightened scrutiny standard of review as required by *Nollan* for all regulatory takings.

As will be shown, the exaction demanded here improperly sought to force the landowner to bear a public burden which, in all fairness and justice, should be borne by the public as a whole. The United States Supreme Court has repeatedly said that this represents the essence of and purpose behind the Takings Clause which was designed to prevent the sort of result found in the decision below. *See, e.g., Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Finally, the requirement that Ehrlich pay a $33,220 art fee not only violates the principles of *Nollan* but also violates the property owner's First Amendment right to refrain from expression--in this case to refrain from financing the artistic statement of the city council and its approved artists.

II

THE EHRLICH CASE REFLECTS A PERVASIVE MISINTERPRETATION OF TAKINGS LAW IN CALIFORNIA

Despite decisions of this Court, including *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), *Nollan v. California Coastal Commission*, 483 U.S. 825, and *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798, 813 (1992), abuse of property owners by government regulators at the state and local level remains endemic in California. Part of the reason may well be the anarchic state of lower court decisions in California, some of which appear to flatly contradict the precedents of this Court. For example, in *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164 (1992), the First District Court of Appeal upheld a "transit impact fee" that had only a questionable relationship to any harms created by the development project. Ignoring the plain meaning of *Nollan*, the *Blue Jeans* appellate court reasoned that the United States Supreme Court's decision in *Nollan* did not apply to exactions of money or fees (but only to exactions of land) even though this Court had said nothing of the kind.

The Ninth Circuit Court of Appeals has been troublesome as well. In *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 118 L. Ed. 2d 593 (1992), the Appeals Court found that a monetary exaction (fees imposed on commercial development to pay for subsidized low-income housing) did not fail the heightened scrutiny test set out in *Nollan*, 483 U.S. at 834 n.3, because "*Nollan* does not stand for the proposition that an exaction

ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question. Rather *Nollan* holds that where there is *no* evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld."

The case at issue, *Ehrlich v. City of Culver City*, is an even more egregious example which fails not only *Nollan* nexus test but also the reformulation of the test in *Commercial Builders*. As explained below, there is simply no serious connection between Ehrlich's construction of condominiums and a need for public art and public tennis courts. *Ehrlich* involves the "extortion" of a $280,000 fee to pay for public tennis recreational facilities in exchange for a permit to build condominiums. The fee is unrelated to any need for public recreation created by the condominiums (a $30,000 park impact fee, paid without protest, covers whatever such need as may exist). 15 Cal. App. 4th at 1743, Appendix to Petition For Writ of Certiorari (petitioner's appendix) at 4-5. In short, there is no "essential nexus" between the fee and the project as required by *Nollan*, 483 U.S. at 837. The City of Culver City wants more public recreation and it is trying to take it from Ehrlich by forcing him to pay a fee that is utterly unrelated to any impact created by his proposed development.

III

THE EHRLICH DECISION CONFLICTS WITH THE STANDARD SET IN NOLLAN V. CALIFORNIA COASTAL COMMISSION

A. Nollan's Two-Part Test Establishes Heightened Scrutiny for Permit Conditions

The most troubling problem with the *Ehrlich* decision is its inherent conflict with *Nollan*. The decision at Pages 14-16 of petitioner's appendix, 15 Cal. App. 4th at 1749-50, contains the most serious misunderstandings of takings law after *Nollan*.

Nollan noted the existence of a bright-line test: if a regulation does not "substantially advance"[2] a legitimate state interest, there is a taking. 483 U.S. at 834 (citing one of two independent tests in *Agins*, 447 U.S. at 260).[3] The Court continued that a regulation in the form of a permit condition meets this "substantially advance" requirement if two conditions are met: first, the government must be able to deny the permit outright (which it cannot do if the denial would so drastically reduce the value of the property as to constitute a taking), 483 U.S. at 835-36, and second, the "permit condition ... [must] serve[ ] the same legitimate police-power purpose as a refusal to issue the permit," *Nollan*, 483 U.S. at 836. Therefore, a permit condition must bear an "essential nexus" to a legitimate police power purpose that could have been used to deny the permit in the first place. *Id.* at 837.

It has not been argued by the city that the permit to build condominiums could have been denied because of any adverse public health, safety, or welfare concerns created by the condominiums. Nor can it seriously be argued that the permit could be denied because of the loss to the community of demolished private tennis courts nor even the loss of the artistic sensibilities inherent in the demolished courts. Thus, the city's permit conditions fails the first part of the *Nollan* test, making the second part (that the condition must serve the same purpose as the denial) moot. Even if the city *could* have denied the permit, it has never shown that the fees would ameliorate any genuine harm

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[2] The term "'substantially advance'" is especially significant as it is distinguished from a mere "rational basis" test. *Nollan*, 483 U.S. at 834 n.3. This heightened scrutiny essentially places the burden of proof upon the government agency rather than involving simply an "exercise in cleverness and imagination" or a mere "pleading requirement." *Id.* at 841.

[3] The other bright-line test is the "economically viable use" test which is met when a regulation destroys all economically beneficial or productive use of property. *Agins*, 447 U.S. at 260; *Lucas*, 120 L. Ed. 2d at 813.

caused by the condominums. In considering this issue, most significantly, the court below badly missed the proper standard of review for this second part.

Nollan cited to over two dozen cases for the proposition that permit conditions must be closely related to impacts actually caused by the proposed development project. *Nollan*, 483 U.S. at 839-40. The first of these cases is particularly instructive. In that case, *Parks v. Watson*, 716 F.2d. 646 (9th Cir. 1983), the court was called on to decide whether the City of Klamath Falls could condition the development of a housing project (which required the vacation of city platted streets) on the dedication of the fee title to a 20-foot strip of land which contained potential geothermal wells to the city. In short, the city wanted the geothermal resource for free. Even though it referred to the old pre-*Nollan* "rational relation" test, it is still obvious that that court would readily reject a condition not mandated by a legitimate governmental interest. The court concluded:

> Since the requirement that Klamath Valley Company give its geothermal wells to the City had no rational relationship to any public purpose related to the vacation of the platted streets, the unrelated purpose does not support the requirement that the company surrender its property without just compensation.

Id. at 653.

Merely identifying a legitimate purpose of regulation is no longer sufficient to avoid a finding of a taking. Rather, regulatory bodies must "demonstrate *a specific and logical connection* between burdens produced by new development and conditions designed to alleviate such burdens." William A. Falik & Anna C. Shimko, *The "Takings" Nexus--The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359, 389 (1988) (emphasis added; footnote omitted).

The appellate court in *Ehrlich*, however, unjustifiably limits the application of *Nollan's* heightened scrutiny requirement only to permit conditions that are also physical invasions:

> Where the condition on approval constitutes a physical taking of private property, the condition must substantially advance the governmental purpose and is subject to heightened scrutiny by the courts. [Citation to *Blue Jeans* omitted.] Monetary exactions compelled as a condition of approval must be only rationally related to the governmental purpose. [Citation to *Blue Jeans* and *Commercial Builders of Northern California v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), omitted.]

15 Cal. App. 4th at 1749, petitioner's appendix at 13-14.

This is wrong because *every* kind of permit condition, physical, monetary, or whatever, logically must be subject to the heightened scrutiny test to see whether the regulation substantially advances a legitimate governmental interest. Indeed, what if a portion of the $280,000 were used to condemn a portion of Ehrlich's property? How would that be any different from the unconstitutional exaction in *Nollan*? To the extent that *Blue Jeans* and *Commercial Builders* purport to hold the contrary, those cases are in conflict with *Nollan*. The holding in *Nollan* is not confined to physical invasions. It is clear from the plain facts of *Nollan* that no physical invasion was involved or even contemplated in that case. The Court did note that *if* the Coastal Commission had simply required the Nollans to give up their land to provide public access, then there would have been a physical invasion and a taking. *Nollan*, 483 U.S. at 831-32.

However, this Court's discussion of permit "conditions" is in no way confined to conditions that are "physical invasions." The Court's "essential nexus" test as set out at 483 U.S. at 836-37 is simply not dependent on a condition being a physical invasion. (Indeed, the analogy used by this Court to illustrate the need for an essential nexus involves a ***monetary*** condition. *Id.* at 837.

The proper scope of *Nollan* was recently set out by the United States Supreme Court in *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153, 161 (1992), where the Court reiterated the criteria for *physical* takings: "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee*, 118 L. Ed. 2d at 161 (emphasis in original). This was plainly not the case in *Nollan* which involved a coercive exaction imposed as a condition to the issuance of a building permit. Since *Nollan* was not a physical takings case, the heightened scrutiny requirement enunciated by the Supreme Court in *Nollan* cannot be confined to physical takings.[4] It is in the context of *regulatory* takings that *Nollan* "changed the standard of constitutional review in takings cases." *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260, 1270 (1991).

Indeed, the *Yee* Court cites *Nollan* as an *example* of a *regulatory* takings case, distinguishing it from the physical takings theory advanced in *Yee*:

> [Evidence of the distributional effects of a regulation] might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance. See Nollan v California Coastal Comm'n, supra, at 834-835, 97 L Ed 2d 677, 107 S Ct 3141. But it has nothing to do with whether the ordinance causes a *physical* taking.

Yee, 118 L. Ed. 2d at 167 (emphasis in original). Thus, the notion that *Nollan* is merely a physical invasion case has been implicitly overruled in *Yee*. Finally, *Nollan's* heightened scrutiny "substantial advancement" standard was first laid down by the

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[4] Indeed, the degree of scrutiny is irrelevant in a physical takings situation because, where a physical invasion is shown, the result is a per se taking.

Supreme Court in *Agins v. City of Tiburon*, a case that involved a challenge to a *zoning* ordinance. Even granting that an incautious reader might become confused and read *Nollan* as a physical invasion case, this could hardly be possible in *Agins*.

If for no other reason than its conflict with *Nollan*, this Court should grant the petition for certiorari. However, as explained in the next two sections below, the decision of the Court of Appeal strays not only from our view of *Nollan*, but it also strays from the interpretations of *Nollan* of a vast number of commentators and the courts of several other states that have considered the meaning of *Nollan*.

B. Nollan's Heightened Scrutiny Requirement Has Been Recognized by Virtually All Serious Commentators

Nollan's heightened scrutiny requirement has been almost universally recognized and discussed in legal journals and commentaries, often by authors who are openly hostile to the *Nollan* doctrine. It is not possible to convey the full breadth of the consensus on this point within the limitations of a single brief. The following is a highly abbreviated but typical sampling of this literature (note that these quotes do not relegate *Nollan's* holding to only *"physical"* (as opposed to *all regulatory)* takings):

> *Nollan's* most important holding is the heightened standard of judicial review it adopted ....

Daniel R. Mandelker, LAND USE LAW § 2.23 at 45 (2d ed. 1988).

> It was Justice Scalia's use of the language of intermediate heightened scrutiny, in connection with a takings analysis ... that marks the importance of the *Nollan* case.

Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 NEB. L. REV. 186, 210 (1991).

> [In *Nollan*], the Court said that it would subject governmental interference with private property to a higher standard of scrutiny than it had in prior decades.

Bart H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1449-50 n.1 (1990).

> [*Nollan*] suggests that a heightened standard of review has replaced the less stringent standard applied by California and Texas courts ....

Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The "Second Generation,"* 38 WASH. U. J. URB. & CONTEMP. L. 55, 100 (1990).

> *Nollan* marks a move away from the minimal rationality test that had been used by the Court in its prior takings analysis.

Bernard F. Meroney, *"Taking" on the Environment: The Takings Clause and Environmental Law--Some Observations*, 36 LOY. L. REV. 1083, 1098 (1991).

> The majority [in *Nollan*] considered a private property interest to be a right, like free speech, subject to heightened judicial scrutiny.

Steven G. Biddle, *Justice Stevens' Pro-Land Use Planning Views and Recent Regulatory Takings Cases*, 21 URB. LAW. 579, 584 (1989).

> *Nollan* not only heightens the level of judicial scrutiny to which state regulators are subject, it also shifts the burden of proof onto the governmental entity defending the land use or environmental ordinance challenged as a regulatory taking.

Rigoberto V. Obregon & Rebekah L. Parker, *"Get It Right the First Time": A Message from the United States Supreme Court to Land Use and Environmental Regulators--A Comment on Nollan and First English*, 7 UCLA J. ENVT'L L. & POL'Y 173, 178 (1988) (footnote omitted). *See also*, Kari Anne Gallagher, Comment: *Yee v. City of Escondido--Will Mobile Homes Provide an Open Road for the Nollan Analysis?*, 67 NOTRE DAME L. REV. 821, 838 (1992); Terry D. Morgan, *Regulatory Takings: A State and Federal Perspective*, 1991 PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 6-16 (footnote omitted); Jason R. Rose, Note, *Forced Tenancies as Takings of Property in Seawall Associates v. City of New York Expanding on Loretto and Nollan*, 40 DEPAUL L. REV. 245, 249 (1990) (footnote omitted); Note, *The Supreme Court, 1986 Term: Leading Cases*, 101 HARV. L. REV. 119, 245, 247 (1987).

PLF is aware of only one article to the contrary. *See* Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925. A review of this article indicates that the author meant to draw on the Supreme Court's traditional distinction between regulatory takings and permanent physical invasions; the argument lacks merit because, as explained above, the distinction it tries to find in *Nollan* simply does not exist.

C. Nollan's Heightened Scrutiny Requirement Has Been Recognized and Followed by State Courts Throughout the United States

In addition to receiving widespread recognition and comment in legal literature, *Nollan's* requirement of heightened scrutiny in regulatory takings cases has been recognized and applied by state courts faced with federal takings claims brought under the Fourteenth Amendment.

> [Regulatory takings challenges require] "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" as articulated in *Nollan*.

Seawall Associates v. City of New York, 542 N.E.2d 1059, 1068 (N.Y. 1989) (striking down a ***monetary*** exaction imposed on hotel owners who wanted to remove vacant rooms from single-room, occupancy rentals).

> [T]he United States Supreme Court has acknowledged that the "rationality" standard determinative of substantive-due-process challenges to State regulation is less stringent than the "takings" standard, which requires that the taking "substantially advance" the State interest to be achieved ....

In the Matter of the "Plan for Orderly Withdrawal from New Jersey" of Twin City Fire Insurance Company, 609 A.2d 1248, 1259 (1992) (citing *Nollan*, 483 U.S. 825).

> *Nollan* ... changed the standard of constitutional review in takings cases. Whether the new standard be described as "substantial relationship," or "heightened scrutiny," it is clear the rational basis test ... no longer controls.

Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal. App. 3d at 1270 (footnotes omitted). *See also*, *id.* at 1270 n.18 (quoting 101 HARV. L. REV. at 247) (ellipses in original).

In short, the appellate court's interpretation of *Nollan* significantly diverges from an overwhelming majority of commentators and courts that have examined that case. *Ehrlich* thus conflicts with *Nollan*.

IV

THE COURT'S RATIONALIZATION OF THE FEE AS COMPENSATION FOR A "BENEFIT CONFERRED" AND AS COMPENSATION FOR "LOST" RECREATIONAL FACILITIES IS ILLOGICAL AND VIOLATES NOLLAN

Under the Nollan two-part, heightened-scrutiny test, a permit condition can be imposed only if the permit could legitimately be denied in the first place (*without* effecting a taking) and if the permit condition serves to ameliorate the harm or burden which could have justified the permit denial. *Nollan*, 483 U.S. at 836-37. In this case, no permit denial can be justified--not only because it would render the property economically valueless, *see, e.g.*, Ehrlich's Petition For Writ of Certiorari at 13 (which would be a taking--*see Lucas*, 120 L. Ed. 2d at 813), *but also* because forcing Ehrlich to remain in the health club business does not substantially advance a legitimate governmental interest.

Even if the permit denial could be justified, the fee does not ameliorate the burdens that could rationalize that denial. However, the appellate court tried to evade these arguments by claiming that the city had the right to force the property owner to use the land only for a recreational facility and to deny all other uses, that there was some sort of productive use in the property as a recreational facility, and that a justification for a denial would be ameliorated by a substitute fee. None of these justifications has merit.

A. Denial of the Permit To Put the Property to Another Use Cannot Be Justified on the Basis of a "Loss" of Community Facilities

The appellate court below tries to justify the fee on other grounds, to wit:

> [T]he [Ehrlich] mitigation fee was not imposed as a condition relating to the development project's burden on the community for increased community services ... *[but] was imposed to compensate the City for the*

> *benefit conferred on the developer by the City's approval of the townhome project* and for the burden on the community resulting from the loss of recreational facilities.

15 Cal. App. 4th at 1749-50, petitioner's appendix at 19-20, (emphasis added). First of all, there is no authority for stating that a landowner's economic benefit supplies a sufficient underpinning for an exaction. If it is understood that the police power forms the exaction's constitutional foundation, it must also be understood that that power is aimed at public need, not private profit. In other words, the fact that there might be some "benefit" to the property owner from a permit cannot justify the denial of the permit and therefore cannot justify any sort of fee. Nor can a fee be based on the "benefit" to the landowner (as bizarrely calculated at 15 Cal. App. 4th at 1750, petitioner's appendix at 16, where the court noted that the condominiums might be worth $10 million) where the fee is not in any way related to any "harm" or "loss" created by the project that could justify a permit denial.

Second, "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder" and "[i]t would be pointless to make the outcome of this case hang upon this terminology." *Lucas*, 120 L. Ed. 2d at 818 and 818 n.11. It all comes down to a simple point: the city wants recreational facilities and it wants someone else to pay for them. *Nollan's* nexus requirement should not be transmuted into a rule of the convenient patsy.

Third, as fully explained by petitioner throughout his petition for certiorari, there is no "loss" of any recreational facilities here because they had been shut down since 1988 and because they were *private* not public facilities.

Furthermore, the court's attempt to turn this private club into a public facility--with the attendant "loss" to the community, by labeling it as a "community" facility, 15 Cal. App. 4th at 1750, petitioner's appendix at 16, is an utterly meritless exercise in grammatical legerdemain. By this reasoning every restaurant, club

(private and public), barbershop, hotel, and law office would be a "community" facility.

B. Forcing a Property Owner To Maintain Property for a Particular Nonproductive Use Does Not Fulfill a Legitimate Governmental Interest Because It Violates the Owner's Right To Go Out of Business

Finally, no government has any legitimate interest in requiring a person to maintain a particular business or follow a particular profession. Without a legitimate interest in requiring Ehrlich to stay in the health club business against his will, the city fails the first prong of *Agins*, 447 U.S. at 260. Using such a fictitious "community" interest as an excuse to hold Ehrlich responsible for Culver City's public recreational needs violates his constitutional right to pursue or not to pursue the profession of one's choice.

In *Allgeyer v. State of Louisiana*, 165 U.S. 578 (1897), this Court held that "[t]he liberty mentioned in that [Fourteenth] amendment ... is deemed to embrace the right of the citizen ... to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation." *Id.* at 589. *See also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

This right means government cannot force landowners to use their property for a particular type of business and includes the right to go out of business. As stated by Judge J. Skelly Wright in *Robinson v. Diamond Housing Corporation*, 463 F.2d 853 (D.C. Cir. 1972): "There would be severe constitutional problems with a rule of law which required an entrepreneur to remain in business against his will." *Id.* at 867. The decision below is in conflict with *Robinson* because Ehrlich is given the choice of remaining in a money-losing business, losing all use and value of his land, or paying an exorbitant fee.

Contrary to the appellate court's assertion, the city cannot force a person to "use his property, if at all, for a recreational purpose," 15 Cal. App. 4th at 1750, petitioner's appendix at 16,

especially when confining use of property to recreational use deprives it of all "economically beneficial or productive use." *See Lucas*, 120 L. Ed. 2d at 813. If the business is a bust then no one is going to buy it; if the decision below is not granted review, it will provide an archetype for local governments to hold people in the position of Ehrlich stuck with useless property with nothing but the privilege of paying taxes on it or the privilege of paying a "fee" to escape the bondage.

V

THE COURT'S APPROVAL OF A $33,220 IN LIEU OF ARTS FEE IS ANOTHER REASON WHY THE CERTIORARI SHOULD BE GRANTED

In addition to the unchallenged $30,000 parks fee, and the $280,000 recreational facility fee, the appellate court also upheld a $33,220 fee which was in lieu of the requirement that Ehrlich provide public art worth 1% of the calculated value of the project. 15 Cal. App. 4th at 1755-58, petitioner's appendix at 24-30. Ehrlich must also ensure for perpetual maintenance of any art built.

Applying the *Nollan* test, the city cannot justify the fee. The condominiums were not being constructed on the site of the Sistine Chapel, the Louvre, the Oakland Museum of Art, the Watts Towers, or even a site as auspicious as the Tilted Cadillacs of Amarillo, Texas. Even in New York City, demolished tennis courts are not considered art when the demolition is not done by a critically recognized artist. Ehrlich, incidentally, is not an artist. In short, no art was lost and no art fee can be justified.

Finally, the appellate court dismissed Ehrlich's First Amendment challenge to the public arts fee with the rationale that Ehrlich could have always put up his *own* art worth $33,220 instead of paying the in lieu of fee. 15 Cal. App. 4th at 1758, petitioner's appendix at 29. However, this still forces Ehrlich to propagate public art against his will *and whatever art is constructed must be approved by the city council*. The First

Amendment protects the right to speech just as much as it protects the right *not* to speak. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 634 (1943) (rejecting view, in mandatory flag salute case, that we have "a Bill of Rights which guards the individual's right to speak his own mind, [but] left it open to public authorities to compel him to utter what is not in his mind").

In *Keller v. State Bar of California*, 496 U.S. 1 (1990), this Court found it unlawful to require a person to pay a fee for political purposes as a mandatory condition for engaging in an occupation. As this Court noted in *Keller*, it is a bedrock principle of American thought that persons should not be compelled to contribute to causes with which they do not agree: "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical.'" Thomas Jefferson, *quoted in Keller*, 496 U.S. at 11 (quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 n.31 (1977) (quoting I. Brant, James Madison: The Nationalist 354 (1948)).

CONCLUSION

The appellate court's notion that *Nollan* did not change the standard of constitutional review in taking cases *when* ***monetary*** exactions are involved fails to comprehend the *Nollan* Court's decision.

Virtually all commentators, including those openly hostile to the ruling, have recognized that *Nollan* established a requirement of heightened scrutiny. So have most courts outside of California that have considered the issue. Yet the *Ehrlich* court would adopt a deferential standard of review and uphold a $280,000 public recreation fee because a defunct private health club would no longer be available to the "community." This sort of nonsense cannot be justified by any court (under even a rational standard of review and certainly not under a heightened scrutiny standard).

This Court has described the basic purpose of the Takings Clause to the Fifth Amendment:

> The Fifth Amendment's guarantee ... [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. United States, 364 U.S. at 49, *(cited in Nollan,* 483 U.S. at 835 n.4) (noting that this is the "principal" rationale for the Fifth Amendment's Taking Clause); *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 123 (1978). *Dolan* can remedy part of the problem created by the lower courts; this case can solve the remainder.

Unless this Court can countenance the explosion of local fees and exactions placed on property owners in order to meet all manner of public wish lists for which the public as a whole is unwilling to contribute through taxes or assessments, the petition for certiorari should be granted. Otherwise, the rationale for the Takings Clause will be lost and the First Amendment weakened.

This Court has accepted review in *Dolan v. City of Tigard,* a case where a local government is requiring an unjustifiable grand of *land* as a permit condition. *Ehrlich* involves an unjustifiable exaction of *money.*

DATED: December, 1993.

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No. 93-842

In The 4

Supreme Court, U.S.
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SUPREME COURT of the UNITED STATES

October Term, 1993

RICHARD K. EHRLICH, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust,

Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIDES, PAUL A. JACOBS,

Respondents.

On Petition for Writ of Certiorari to the Court Of Appeal, State of California

OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

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On Petition for Writ of Certiorari to the Court Of Appeal, State of California

OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Respondents, City of Culver City, City Council of the City of Culver City, Steven Gourley, Jozelle Smith, James Boulgarides, Paul A. Jacobs, (hereinafter the "City") respectfully request this Court deny the Pacific Legal Foundation's Motion for Leave to File a Brief *Amicus Curiae* (hereinafter, the "motion")in support of the

Petition for Writ of Certiorari filed in this case.

STATEMENT OF OBJECTIONS

The City will not reiterate points made in its Opposition to the Petition for Writ of Certiorari (hereinafter, the "petition"). Pursuant to Supreme Court Rules 21 and 37[1], the City objects to the motion for four reasons. First, pursuant to Supreme Court Rule 37.2, the motion is not favored. Second, the motion includes misstatements of fact and law. Third, the motion does not raise any issues nor present any information not already presented by the petitioner. Fourth, the motion contains inappropriate disrespectful language which should not be condoned by the Court.

A. The Motion is Not Favored.

As Pacific Legal Foundation (hereinafter, "PLF") correctly notes, pursuant to Supreme Court Rule 37.2, the City refused consent for the filing of a brief *amicus curiae* by PLF. Such request was denied for two reasons. First, PLF requested and was granted leave to file a brief *amicus curiae* in the Court of Appeal. Such brief did not add any new arguments or information germane to the issues in this case. In addition, in its brief *amicus curiae* in the lower court, PLF made inflammatory and irrelevant references to "scandals involving the National Endowment for the Arts". Based on the authority

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[1] Respondents' Objection to the motion is timely pursuant to Supreme Court Rule 21.4. Respondents received the motion on December 27, 1993.

granted to the City, pursuant to Supreme Rule 37.2 and the City's previous experience with PLF, the City could not agree to subject this Court and itself to the same potential indignities suffered by and in the lower courts.

This Court has established its own rules regarding the subject motion at this stage in the proceedings. "A motion for leave to file a brief *amicus curiae* when consent has been refused is not favored." Supreme Court Rule 37.2. As shown below, the Court will be best served, at this juncture, if the above noted Rule is enforced.

B. Misstatements of Fact and Law.

Similar to the petition, PLF has misstated several important facts in order to persuade the Court of the need for intervention. Throughout the papers filed by PLF, the purpose of the mitigation fee is mischaracterized. In addition, PLF continually argues the fee must be related to impacts caused by the construction of the townhome project.[2]

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[2] In its motion (Mot. at iii), PLF asserts the mitigation fee was to alleviate the impact of the "loss of private tennis courts". In its brief amicus curiae (Brief at 2) PLF again asserts the mitigation fee was imposed "to make up for the loss of public recreational opportunities represented by the demolished private facilities [emphasis added]". Next, PLF asserts the fee "bears no discernible relationship to an impact created by the building project". Brief at 3. Finally, PLF argues, "[T]here is simply no serious connection between [petitioner's] construction of condominiums and a need for ... public tennis courts" (Brief at 6); and "[n]or can it be seriously argued that the permit could be denied because of

In actuality, the mitigation fee was imposed for the sole purpose identified by the Court of Appeal in its reference to the City's findings. "This fee will be used to pay for the replacement of community recreational facilities which are currently provided for by the land use permitted on the subject site, which will be removed pursuant to this approval." Emphasis added; App. 8-9[3]. The clear purpose of the fee was to mitigate the community's lost opportunity to have recreational facilities developed and properly maintained and operated on the subject site. Such loss derived directly from the approval of the land use change which permitted the construction of the deluxe townhome project. App. 15.

Pursuant to *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), an exaction passes constitutional muster if it addresses the same governmental interest which would be advanced by an outright denial of the development project upon which the exaction is imposed. Again as noted by the Court of Appeal, the close nexus between the mitigation fee and the interests served by denial of the land use change is evident. "The imposition of the $280,000 fee was imposed for the express purpose of mitigating the effect of the loss of land restricted to community recreational use which would result from approval of the developer's project." Emphasis added; App. 14.

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the loss to the community of demolished private tennis courts" (Brief at 7).

[3] As with the City's Opposition to the petition, references to any appendix to the petition shall be noted as App. __.

PLF goes to great lengths to advocate *Nollan* has established a "bright-line test" of heightened scrutiny. Brief at 7. However, even this Court applied the "reasonably related" test when it determined the condition requiring public access across beach front property did not substantially advance the legitimate state interest in lowering the "psychological barrier" to access to the beach. *Nollan*, *supra*, at 838. After applying the reasonably related standard, the Court cited several cases (a few of which are identified below) which also upheld applications of the less strict levels of scrutiny. *Longboat Key v. Lands End, Ltd.*, 433 So.2d 574 (Fla. App. 1983) (applied a "rational nexus" test); *State ex rel. Noland v. St. Louis County*, 478 S.W.2d 363 (Mo. 1972), *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78 (1966) and *Jordan v. Menomonee Falls*, 28 Wis.2d 608 (1965) (all applied a "reasonable relation" test).

Justice Scalia also declared, if a condition requires the conveyance of land, a heightened scrutiny will be used to determine whether the legitimate state interest really is being substantially advanced.

> As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "substantial advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

Nollan, at 841. Thus, even *Nollan* recognizes a lesser standard is appropriate when a monetary exaction is involved.

PLF asserts an "'essential nexus' between the fee and the [petitioner's] project [is] required by *Nollan*, 483 U.S. at 837." Brief at 6. However, PLF failed to explain what the "essential nexus" test discussed in *Nollan* really is. In fact, it creates a standard which seems to be even less stringent than the "reasonable relation" test. The essential nexus referred to by Justice Scalia is the complete failure of a condition to serve the same legitimate goal as would an outright denial.

> The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as justification for the prohibition. When that essential nexus is eliminated, [the constitutionality of the condition is forfeited].

Nollan, at 837. As stated earlier, the Court of Appeal and the City's findings show there is no utter failure in the connection between the mitigation fee and the outright denial of the requested land use changes.

With regard to the Art in Public Places Program, PLF again misrepresents the facts. PLF insinuates the City's City Council has unfettered authority to disapprove art proposed by a developer to satisfy the Art in Public Places Program. Mot. at iii; Brief at 18. In fact, the City's planning commission, on recommendation of the city's arts committee, has authority only to determine whether the artwork is compatible with the aesthetics of the development itself. The City Council would review the

matter only on appeal. Culver City Municipal Code § 33H-27; App. 85-86. The limited nature of the review process established by the City's Art in Public Places Program does not violate anyone's rights to free speech or association.[4]

C. No New Issues Are Raised by PLF.

The brief filed by PLF covers little new ground, and in the interest of judicial economy, this objection will not repeat arguments previously made by the City. However, since PLF has cited cases not previously cited by petitioner in the attack on the mitigation fee as well as reiterated several mischaracterizations of the fee, the City submits this short reply to these issues.

PLF has fabricated a "straw man" argument to challenge the validity of the mitigation fee. PLF then uses quotations from diverse and archaic cases to knock this straw man down.

Specifically, PLF argues, if the City had denied the requested land use change, then it somehow

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[4] It is interesting to note, petitioner never raised any objection to the City's authority to review art work which, under the art program, could be proposed for the project site. During the pendency of the case below, petitioner had decided to pay the in lieu fee, rather than place the art on the property. The challenge below was to the constitutionality of the in lieu art fee not the placement of art on-site. As noted by the Court of Appeal, "The developer does not argue that such rights of approval violate his first amendment rights. If the developer elects to pay a fee instead of choosing the art, the developer may not then complain that his first amendment right to freedom of speech has been violated." App. 29.

would have been "requiring [petitioner] to stay in the health club business against his will." Brief at 17. Having set up this erroneous premise, PLF cites to the authority discussed below for the proposition the City cannot require petitioner to maintain a facility. Since the City cannot require petitioner to maintain a recreational facility, so this flawed logic proceeds, it cannot impose a fee to mitigate the impacts of the change in land use restrictions from recreational uses to residential uses.

This line of argument is completely without merit. As is clearly established by the record and discussed in the City's previously filed brief, the City has not required petitioner to maintain and operate a recreational facility. Rather, petitioner requested the City to change the land use designation of its property from recreational uses to a designation which would permit the condominium project. The mitigation fee was designed to compensate the City for the loss to the community of the recreational opportunities which would have existed but for the granting of the requested land use reclassification. The mitigation fee does not require petitioner "to stay in the health club business".

Thus, the cases cited by PLF simply are not pertinent to the issues before this Court. *Robinson v. Diamond Housing Corporation, 463 F.2d 853 (D.C. Cir. 1972)* involves (at least tangentially) the question of whether a property owner can be forced to stay in business. Since the City has not attempted to force petitioner to stay in the recreation business, this case has no relevance.

Even more curious are the citations by PLF to *Allgeyer v. State of Louisiana*, 165 U.S. 578 (1897) and *Meyer v. Nebraska*, 262 U.S. 390 (1923) in support of

its position that the mitigation fee is unconstitutional. In *Allgeyer*, this Court held Louisiana could not penalize one of its citizens for insuring goods located within Louisiana by entering into an insurance contract in New York with an insurance company not authorized to do business in Louisiana. In *Meyer*, the Court held unconstitutional a state statute which made it a criminal offense to teach German to students in public or private schools. It is hard to imagine citations more far afield than these.

Rather than explaining to this Court how these cases are relevant to the issues in this appeal, PLF has taken out of context certain language in its seeming effort to demonstrate the invalidity of zoning ordinances in general. For example, PLF cites a passage in *Allgeyer* which states that the Constitution protects the liberty of every United States citizen to "live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation." *Id.* at 589. Brief at 17.

Apparently, PLF believes this right to "pursue any livelihood or avocation" includes the right of a property owner to use its property in any manner it desires. Not only do *Allgeyer* and *Meyer* not support this argument, such an assertion runs completely counter to the long-established principle that the zoning of property is a constitutional exercise of the police power. *See, Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926).

Clearly, the City has authority to zone various property within its jurisdiction in such a way as to permit only single-family dwellings, golf courses, regional malls or other uses it deems necessary for a balanced community. *Id.* Case law has established that zoning

regulations requiring recreation and open space are legitimate exercises of a city's police power. *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal.3d 633 (1971) [cert. denied 404 U.S. 878 (October 1971)]. Further, as long as such restrictive uses advance a legitimate state interest and continue to provide a property owner with a reasonable economic use of its land, a request to change such land use regulations could be denied. *See, Keystone Coal Association v. DeBenedictis*, 480 U.S. 470, 488 (1987).

The record includes facts which clearly show a well-run and designed community recreation facility could be operated for a profit on the subject property. App. 7-8. With this in mind, the City could have refused to grant the requested land use change. Had it done so, the City would have retained for the community the opportunity to have much needed recreational facilities. Instead, the City determined it would grant petitioner's request for a land use change, but only if petitioner partially mitigated the lost opportunity created by the requested change. In this way, the City provided for additional housing and to some degree retained the opportunity for recreational facilities, while still granting petitioner the land use change as requested.

Such a condition no more violates petitioner's right to pursue any livelihood or avocation it wanted than would the denial of the land use change outright. Likewise, the recreational facility designation does not invalidly encumber the property any more than a designation which would only permit the construction of a single-family dwelling, a movie studio, a regional shopping mall or a low- and moderate-income rental housing complex. Therefore, the mitigation fee was a constitutional

exercise of the City's regulatory land use authority.

D. PLF's Disrespectful Language Should Not Be Condoned.

Peppered throughout the motion and its Brief, PLF presents the Court with caustic commentary which shows a disdain for California and Federal Courts and local government.[5] Not only are such remarks inappropriate, but they also do not recognize the care with which the California Legislature, the Court of Appeal and

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[5] "This case involves another egregious violation of federal constitutional rights in the guise of local land use permitting regulations." ... "This condition is an egregious violation of this Court's decision in Nollan." Emphasis added; Mot. at iii. "Lower courts have devised a formula for abuse and obfuscation of this Court's formulation of the law of takings. ..." Emphasis added; Brief at 2. The mitigation fee is "extortionate". Brief at 3. The Court of Appeal decision suffers from an "inherent vice" and contains a "facile conclusion". Brief at 4. "[A]buse of property owners by government regulators at the state and local levels remains endemic in California. Part of the reason may well be the anarchic state of lower court decisions, some of which flatly contradict the precedents of this Court. ... ¶The Ninth Circuit Court of Appeals has been troublesome as well." Emphasis added; Brief at 5. This case involves an even "more egregious example which fails "to meet this Court's and the Ninth Circuit's requirements. The case involves "extortion". The fee is "utterly unrelated to any impact". Emphasis added; Brief at 6. PLF asserts the Court of Appeal acted "bizarrely" when it balanced the benefits to the developer resulting from the land use change against the burden imposed by the mitigation fee. Emphasis added; Brief at 16. "This sort of nonsense cannot be justified by any court. ..." Emphasis added; Brief at 19.

the City have implemented this Court's direction in *Nollan*. As noted in the City's Opposition to the petition (at pages 3-5), the California Legislature has adopted a statutory scheme which all local governments in California must follow before development related fees can be imposed. PLF also ignores the Court of Appeal's express finding that the City's mitigation fee met both the "heightened scrutiny test" set by *Nollan* for conditions requiring conveyances of land and the less stringent "rational relation" test, which *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) [cert. denied _ U.S. ___, 112 Sup.Ct. 1997 (May 1992)] and *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App.4th 164 (1992) [cert. denied __ U.S. __, 113 Sup.Ct. 191 (October 1992)] applied to monetary exactions.[6] Finally, PLF's assertions do not give any weight or recognition to the evidence in the record and the extensive and express findings the City made prior to imposing the mitigation fee and the art program. App. 7-9, 16, 19, 23-25, 80-81.

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[6] Both PLF and petitioner appear to want to reargue the same issues this Court found did not warrant its intervention when it denied the separate writs for certiorari in Commercial Builders and Blue Jeans Equities.

CONCLUSION

For the reasons stated herein, the Court should deny PLF's Motion for Leave to File a Brief *Amicus Curiae*.

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